Supreme Court of the United States

OCTOBER TERM, 1956

No. 276

GENERAL ELECTRIC COMPANY,
PETITIONER,

v.

LOCAL 205, UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

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Statutes Involved

In addition to the statutes cited by Petitioner (Br. p. 2) there are also involved Mass. G. L. (Ter. Ed.) c. 150, Section 11:

"Collective Bargaining Agreements Relating to Arbitration, etc.; Validity, Finality, etc.—All provisions

of collective bargaining agreements relating to arbitration and conciliation before public or private arbitration and conciliation tribunals shall be valid, and if the parties to such agreements agree that the determination of the tribunal on any issue shall be final, such determination shall be deemed final and shall be enforceable by proper judicial proceedings. (1949, 548, appvd. July 13, 1949; effective 90 days thereafter.)"

and Mass. G. L. (Ter. Ed.) c. 251, Section 14:

"*Arbitration between Parties to Contracts.*—The parties to a contract may agree in writing that any contract hereafter arising under the contract which might be the subject of a personal action at law or of a suit in equity shall be submitted to the decision of one or more arbitrators. (1925, 294, § 5)."

Questions Presented

1. Whether the Norris La Guardia Act is applicable to deprive a federal district court of jurisdiction to compel specific performance of an agreement, in a collective bargaining contract between a union and an employer, to arbitrate grievances of individual employees arising out of alleged violations of that contract.

2. Whether Section 301(a) of the Labor Management Relations Act of 1947 confers jurisdiction on a federal district court over a suit for violation of an agreement in a collective bargaining contract between a manufacturing company and a union in an industry affecting commerce, to arbitrate grievances of individual employees arising out of alleged violations of that contract, where the agreement to arbitrate is a promise which runs to the union alone, and

which the individual employees could not equally enforce in a personal cause of action; and, if so, whether Section 301, construed in the light of its legislative history, grants to the district court authority from Section 301 itself, authority to use its inherent equity power, or authority to employ any law, including state law, to compel specific performance of the agreement to arbitrate.

3. Whether, in a suit, in which jurisdiction is based on Section 301(a) of the Labor Management Relations Act of 1947, a federal district court has jurisdiction and is authorized by Section 4 or Section 2 of the United States Arbitration Act to compel specific performance of an agreement, in a collective bargaining contract between a manufacturing company and the union which represents its production and maintenance employees in an industry affecting commerce, to arbitrate grievances of individual employees arising out of alleged violations of that contract. This question, in turn, depends upon (1) whether a collective bargaining agreement between an employer and a union in a manufacturing industry in commerce is "a contract evidencing a transaction involving commerce" under Section 2 of the Arbitration Act; (2) whether such a contract is excluded from the operation of that Act as "a contract of employment" under Section 1 of the Act; and whether production and maintenance employees in a manufacturing industry affecting commerce are within the definition of "seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce", under Section 1 of the Act.

4. Whether in a suit for violation of an agreement to arbitrate in a collective bargaining contract, in an industry affecting commerce, where the union as an entity and all its members are diverse in citizenship from the employer

and jurisdiction is asserted under Title 28 U.S.C. Section 1332 (a) (1), a federal district court is authorized by Massachusetts law to compel specific performance of the agreement to arbitrate; and whether in such a suit by the union under Section 301 (a) and 301 (b) of the Labor Management Relations Act of 1947, the union is entitled to sue as an entity under the second clause of Rule 17(b) of the Rules of Federal Procedure, or by that clause as extended by Section 301(b) of the Labor Management Relations Act of 1947, without regard to Massachusetts law, which does not permit a suit by a union as entity.

Statement of Case

Petitioner is a New York corporation, having a plant at Ashland, Massachusetts which is, without dispute, in an industry affecting commerce.

Respondent is a voluntary unincorporated local labor union, with its principal place of business in Ashland, Massachusetts, all of whose members are citizens of states other than New York (R. 57-58). It has been certified by the National Labor Relations Board and is recognized by the petitioner as the representative for the purpose of collective bargaining of the employees at petitioner's Ashland plant.

The collective bargaining agreement between the parties, which was in full force and effect at all times relevant hereto, established a conventional four step procedure for the settlement of employee grievances. It contained a provision requiring the Company to furnish the Union a complete list of job classifications and rate ranges (Article IX, R. 24) and a "dismissal for cause" clause (Article XII, R. 25). It further provided that "any matter involving the application of interpretation of any provisions of this Agreement" with certain exceptions not here material;

"may be submitted to arbitration by either the Union or the Company," by written notice given after the decision in the fourth step of the grievance procedure (Article XII, R. 31-33). The agreement also contained a no-strike, no lock out clause (Article XIII, R. 34).

On April 2, 1954, the Union duly filed a written grievance that employee Boiardi was being employed at a job classification which carried a higher rate of pay than he was in fact receiving and on August 13, 1954, a second grievance that employee Armstrong had been discharged arbitrarily and not for cause. After unsuccessfully prosecuting these grievances through the fourth step of the grievance procedure, the Union duly notified the company in each instance of its desire to arbitrate, but the company refused to submit to arbitration either the grievance or the question of its arbitrability.

The union then filed its complaint in the District Court, alleging in its amended complaint that the Company had violated its agreement to arbitrate under Article XIII of the agreement, with respect to the Boiardi and Armstrong grievances, referring to Articles IX and XII of the agreement; that the action arose under Sections 301(a), (b) and (c) of the Labor Management Relations Act of 1947 and praying that the company be required specifically to perform its agreement to arbitrate these grievances, in accordance with the contract and for damages. The Company moved to strike that portion of the prayer for relief asking that it be compelled to arbitrate these grievances on the ground that the Court had no jurisdiction to grant the remedy of specific performance. The District Court granted the motion for want of jurisdiction (R. 55) on the sole ground that "the plain language of Norris La Guardia forbids the issuance of an injunction" (R. 53). The Union then amended its complaint to eliminate any prayer for damages, so that no question could be raised as to the

appealability of the decision (R. 55-56, 54-55) and, for the purpose of asserting diversity jurisdiction, added allegations that the matter in controversy exceeds the sum of three thousand dollars exclusive of interests and costs, that it had no adequate remedy at law, and that it would be subject to irreparable injury unless granted the relief requested. As thus amended, the amended complaint requested only specific performance of the agreement to arbitrate and such other and further relief as the Court deems proper (R. 55). This motion was allowed, and the District Court, expressly in accordance with its earlier ruling that it lacked jurisdiction because of the Norris LaGuardia Act, entered final judgment dismissing the action for want of jurisdiction (R. 56).

On January 31, 1956, while the case was on appeal, and after the decision of this Court in *Bernhardt* v. *Polygraphic Co.*, 340 U.S. 198 (Jan. 16, 1956), respondent filed a motion under 28 U. S. C. Sec. 1653, with supporting affidavit, to allege that all the employee members of or employees represented by the Union are citizens of states other than the state of New York, where petitioner is incorporated, and that the Court had additional jurisdiction by virtue of Title 28 U. S. C. Sec. 1332(a)(1). (R. 57-58) The affidavit was uncontroverted.

On appeal, the Court below reversed (R. 82-83). It held that the Norris La Guardia Act was not applicable to a suit for specific performance of an agreement to arbitrate in the collective bargaining contract herein. With respect to the affirmative basis for granting such relief, it held that in action under Section 301 (a) of the Labor Management Relations Act, the availability of the remedy of specific performance was to be determined by federal, not state law; that Section 301 does not provide a sufficiently firm statutory basis for such enforcement; that the United States Arbitration Act provides an integrated system for

compelling arbitration; that the collective bargaining agreement herein is a contract evidencing a transaction involving commerce, within the meaning of Section 2 of that Act, and was not excluded from the operation of that Act, by Section 1 of the Act as a "contract of employment" of "workers engaged in foreign or interstate commerce"; and that the remedy of specific performance was available under Section 4 of the Act. Accordingly it vacated the judgment of the District Court and remanded the case for further proceedings (R. 82-83). It also denied plaintiff's motion to amend the complaint to show diversity jurisdiction on the ground that it may have become moot and in any event because, under Rule 17(b) F. R. C. P. it could not accomplish the result intended (R. 82).

Summary of Argument

I. The Court below correctly held that the general structure, detailed provisions, declared purpose and legislative history of the Norris La Guardia Act show that it has no application to the suit herein to compel specific performance on an agreement to arbitrate, in a collective bargaining contract voluntarily made. Petitioner's argument that the Court's interpretation permits unions to compel specific performance of arbitration clauses, free of the prohibitions of the Norris La Guardia Act, but forbids employers to obtain injunctions against picketing without compliance with the Act, is answered by the Court's opinion which holds the Act equally applicable to both union and employer, with respect to conduct which the Act makes absolutely or conditionally non-enjoinable. Petitioner's argument that the Court has in effect made an *ad hoc* exception to Section 7 of the Act for orders to compel arbitration mistakes the nature of the Court's holding, which is that such orders are not subject to any prohibitions of the Act.

Petitioner's citation of earlier cases which, it asserts, held the Act to apply to non-coercive conduct such as breaches of contract do not support petitioner's claim and are irrelevant since there is no conflict among the Courts of Appeal with respect to the issue decided by the Court below, whose decision is in accord with decisions of the Third, Fifth, and Sixth Circuits. Petitioner's attempt to distinguish decisions of this Court which held that the Act is not applicable to prevent equitable relief against racial discrimination, even though a labor dispute was involved, is without justification in those decisions. Nor can any support be derived, as petitioner asserts, from the refusal of Congress to repeal the Norris La Guardia Act, when it enacted Section 301 of the Labor Management Relations Act of 1947, since the prohibitions of the former Act are not coextensive with the relief that may be granted, in private suits under Section 301, of the latter Act. The wisdom of making clauses other than agreements to arbitrate in collective bargaining contracts valid, binding and enforceable, and therefore opening up the field of labor contracts generally to policing by the courts, to which petitioner objects, is not a reason for refusing relief where it is warranted, and, in any event, it was the intent of Congress to make such contracts valid, binding and enforceable on both parties. Petitioner's argument that the holding of the Court below results in an inequality of treatment between employers and unions, which is at variance with Congressional policy, is not supported by the decision below, and such "practical grounds" as it asserts are themselves at variance with Congressional policy.

Although the Court below declined to rest its holding on the label applied to the order to compel specific performance, there is strong separate support in the George amendment and elsewhere in the legislative history, the text,

and the decisions of this Court for holding that the Act does not apply to a mandatory injunction which does not trench upon its interdictions.

II. The Court below held that although Section 301 conferred jurisdiction over the controversy here, under *Association of Employees* v. *Westinghouse Co.*, 348 U.S. 43 (1955), because there was a breach of a promise which only the unions could enforce and not a personal right of the employees to individual benefits, and although federal, not state law governed, Section 301 was not a sufficient statutory basis on which to ground a decree for specific performance of the agreement to arbitrate herein.

Despite the petitioner's claim that the rights involved in the arbitration are personal to the employees concerned, the court's holding on jurisdiction is amply warranted in the record. The collective bargaining contract shows that the Union and the Company are the only parties to the arbitration clause and that individual employees are excluded from its operation. Petitioner's insistence that Section 301 authorizes only actions for damages is misguided. The legislative history and policy of the Act, which is analyzed in detail, sufficiently demonstrate the intent on the part of Congress that both legal and equitable relief, including specific performance of agreements to arbitrate, should be available under Section 301.

The common law rule that contracts to arbitrate future disputes are not specifically enforceable is not a "fundamental principle of contract law", as petitioner contends, nor a sufficient reason to refuse to invoke Section 301 to compel specific performance of the agreement to arbitrate herein, as the Court below thought. The common rule is mortmain in an era when the encouragement of arbitration in labor relations matters is a consistent national policy, fostered by governmental agencies and the courts, and

arbitration clauses are in widespread use in modern collective bargaining contracts, and serve a useful purpose in settlement of labor disputes that might otherwise erupt in industrial strife.

The lack of a detailed procedure in the statute is not fatal to its use. The federal district courts, as courts of equity, have inherent power to adapt their remedies to make effective and safeguard arbitration agreements; and the parties themselves, through the Federal and state mediation boards, the American Arbitration Association and other private tribunals, have adequate facilities at their disposal to make arbitration effective. Moreover, many of the legalistic features of commercial arbitration are unnecessary in labor arbitration, and the lack of such procedures in Section 301 is an insufficient warrant to deny its use.

Even if Section 301 does not in its own terms authorize specific enforcement or authorize the federal district courts to employ their inherent equity powers to that end, Congress has in Section 301 conferred on the District Courts a protective jurisdiction, in the exercise of which it may apply any law, including State law, to protect the federal labor policy. Under Massachusetts law, this agreement to arbitrate is valid and creates rights in the parties and it is a fully warranted estimate of Massachusetts law from recent decisions of its highest court and recent legislative developments that specific enforcement of this agreement to arbitrate would be an available remedy in the Massachusetts courts.

III. The legislative history of Section 1 of the United States Arbitration Act, which is examined in detail, shows that the exclusion of "contracts of employment" in Section 1 of the Act refers unambiguously to individual contracts of employment of workers in foreign and interstate

commerce, and does not apply to collective bargaining contracts in any industries affecting commerce. In any event, it was intended to apply to the contracts of classes of workers actually in interstate commerce, such as seamen, railroad employees, stevedores and other in the maritime and transportation industries, and not to contracts of production and maintenance employees of a manufacturer, in an industry affecting commerce, such as are here involved. The legislative history is a sufficient basis for finding that "contracts evidencing a transaction involving commerce" in Section 2 of the Act covers collective bargaining contracts. These interpretations of Sections 1 and 2 of the Act are in accord with the policy of the Arbitration Act and federal labor policy. There is no merit in petitioner's argument that Section 4 of the Arbitration Act which requires jurisdiction to be founded on Title 28 U. S. C. and to be tested as if no agreement for arbitration existed, is inapplicable because the present controversy, underlying the arbitration agreement, concerns only the personal rights of employees arising out of the contract, not out of federal law, or any source of jurisdiction under Title 28.

The controversy here is over rights in a collective bargaining contract in an industry affecting commerce and jurisdiction over these rights is conferred, not by the contract, but by Section 301 of the Labor Management Relations Act. The present complaint which meets the test of Section 301 satisfies the requirements of Section 4 of the Arbitration Act and Title 28. Moreover, the underlying controversy concerns clauses in the collective bargaining contract which run to the Union only, and are not enforceable by the individual employees without prior action by the Union, where the Union's interest is sufficient to justify a cause of action under Section 301. If Section 4 of the Arbitration Act is inapplicable, Section 2 of that

Act provides an alternative basis for granting specific performance, where the court has jurisdiction under Section 301 of the Labor Management Relations Act.

IV. On the basis of diversity jurisdiction and applicable Massachusetts law, the court had jurisdiction to compel specific performance of the agreement to arbitrate. The Union had capacity to sue as an entity, by virtue of Rule 17(b) of the Federal Rules of Civil Procedure and Section 301(b) of the Labor Management Relations Act, without regard to its capacity to sue under Massachusetts law. Section 301(b) is a general capacity statute, which is an extension of Rule 17(b) and permits suit in its own name by a union representing employees in an industry affecting commerce where the court has diversity jurisdiction and state law is to be applied. The same result is reached if Section 301 is held to create a federal substantive right but the right is defined by incorporating state substantive law as a part of the federal law; or if Section 301 itself serves as a substantive right under the laws of the United States for the purpose of permitting the Union to sue in its own name, pursuant to Rule 17(b). Both the Union as an entity and all its members are citizens of states other than the state in which the petitioner was incorporated; the requisite jurisdiction amount is alleged, and at this state of the case, not denied; and the value of the right in controversy may reasonably be found to exceed Three Thousand Dollars.

Recent decisions of the Supreme Judicial Court and recent legislative developments in Massachusetts fully warrant the estimate that agreements to arbitrate in collective bargaining contracts are specifically enforceable in Massachusetts and the application of Massachusetts law in a diversity action in this case would reach the same result as the application of federal law.

1. The Court Below Was Correct in Holding that the Norris La Guardia Act Does Not Deprive the District Court of Jurisdiction to Compel Specific Performance of the Agreement to Arbitrate Herein.

The Court below, in a careful review of the text and legislative history of the statute, correctly held that "jurisdiction to compel arbitration is not withdrawn by the Norris La Guardia Act" (R. 63) and that "an order to compel arbitration is neither barred specifically by Section 4 nor subject to the requirements of Section 7" (of the Norris La Guardia Act) (R. 68). As an apt summary of its analysis the Court quoted from *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 142 (D. Mass. 1953). "The general structure, detailed provisions, declared purpose and legislative history of that statute (Norris La Guardia Act) show it has no application to cases where a mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made."

Petitioner attacks this decision on the ground that it misreads the statute as excluding an injunction against an employer's breach of contract to arbitrate, and as applying only to "injunctions" prohibiting "unilateral coercive conduct" such as "union conduct in strikes and picketing" (Br. 56).

This is not an accurate reading of the Court's opinion. The Court said "For reasons to be developed below, we believe that the "injunction" at which Section was aimed is the traditional labor injunction, typically an order which prohibits or restricts unilateral or coercive conduct of either party to a labor dispute (R. 64). The enumerated requisites (of Section 7) which draw a logical line in relation to union conduct in strikes and picketing (and perhaps to some employer activities) are not at all compatible

with the situation where one party merely demands that the other be compelled to arbitrate a grievance, in accordance with a contract provision for arbitration, in which latter situation, the required findings seldom, if ever, could be made, either affirmatively or negatively. They just do not sensibly apply." (R. 65-66).

Petitioner argues that the court in interpreting "injunction" in Section 7 has, in effect, said that if a statute contains only a very narrow exception, the statutory command should be interpreted as not applying to cases which it is difficult or impossible to bring within the exception (Br. 57). This argument entirely overlooks the fact that the Court did not seek to make the order to compel arbitration an *ad hoc* exception to Section 7 of the Act. It held that such an order is not included in the prohibitions of the Act at all. (R. 65-67).

Petitioner further argues that the reasoning of the court runs counter to a long line of decisions holding that the prohibition of Section 7 is not confined to cases of unilateral coercive conduct but has been applied to bar injunctions against non-coercive conduct such as breaches of obligations under statutes or contracts (R. 57-58). None of the cases which it cites involves an order to compel arbitration. Some involve no labor dispute at all (*Fitzgerald* v. *Abramson*, 89 F. Supp. 504 5D N. Y. 1950). Others are silent as to the nature of the relief requested. (*Wilson* v. *Dias*, 72 F. Supp. 198 Pa. 1947). Still others involve issues held to be within the exclusive primary jurisdiction of the National Labor Relations Board (*United Packing House Workers* v. *Wilson & Co.*, 80 F. Supp. 563 N. D. Ill. 1948; *California Ass'n.* v. *Building Trades Council*, 178 F.2d 175 (C. A. 9, 1949); see *Wilson Employees Representation Plan* v. *Wilson & Co.*, 53 F. Supp. 23 (S. D. Calif. 1943) or subject, in the first instance, to the Adjustment Boards, under the Railway Labor Act (*Missouri K. T. R. R. Co.*

v. *Randolph*, 164 F.2d 4 (C. A. 8, 1947 cert. den. 334 U. S. 818 (1948)). Others involve strikes, picketing, boycotts, bombing or violence, in which the moving party either did not attempt or attempted but failed to prove one or more of the essential requisites of Section 7 (*Green* v. *Obergfell*, 121 F.2d 46, 63 (D. C. Cir. 1941), *Lee Way Motor Freight Inc.* v. *Keystone Freight Lines*, 126 F.2d 931 (C. A. 10, 1942); *East Texas Lines* v. *Teamsters Union*, 163 F.2d (C. A. 5, 1947).

It is unnecessary to attempt to distinguish these cases further, since there is no conflict of decision among the Courts of Appeals on the issue decided by the Court below. The decisions of the Third, Fifth, and Sixth Circuits are in accord with it and none opposed. *Textile Workers Union* v. *Lincoln Mills of Alabama*, 230 F.2d 81, 84-85 (C. A. 5, 1956); *Milk and Ice Cream Drivers* v. *Gillespie Milk Products Corp.*, 203 F.2d 650 (C. A. 6, 1953); *Local* 19 v. *Buckeye Cotton Oil Co.*, 236 F.2d 776 (1956); see *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F.2d 401 (C. A. 3, 1956).

Petitioner next attempts to distinguish *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515 (1937), *Graham* v. *Brotherhood of Firemen*, 338 U. S. 232 (1949) and *Syres* v. *Oil Workers International Union*, 350 U. S. 892 (1955), upon which the Court below relied, on the ground that in the first two cases the plaintiffs were seeking to enforce a right created by statute, and here the union is seeking to enforce a right under a contract, and the *Syres* case on the ground that all that was decided there was that the cause of action alleged did arise under the laws of the United States (Br. 59-60, R. 65). But the *Syres* case, which sought an injunction against the enforcement of a contract, did not depend upon any special statutory provision of the Railway Labor Act, and concerned employees subject to the Labor Management Relations Act

of 1947. The Per Curiam opinion of this Court cited *Steele* v. *Louisville & Nashville R.*, 323 U. S. 192 (1944), *Tunstal* v. *Bro. of Locomotive Firemen and Enginemen*, 323 U. S. 210 (1944), and *Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952) and these cases relied on the *Virginian Railway* and *Graham* cases, which held "the evident purpose of this section (Section 9 of the Norris La Guardia Act) as its history and context show was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are usually prohibitory in form and to confine the injunction to the particular acts complained of and found by the Courts" (*Virginian Ry. Co.*, *supra* at 563). It is immaterial, even if true, that jurisdiction of the court here is based on rights asserted under a contract rather than under a statute. The nub of the *Virginian Ry. Co.* decision and its progeny on this score is that the Norris La Guardia Act does not deprive the Court of jurisdiction to issue equitable relief where the relief sought does not trench upon the interdictions of the Norris La Guardia Act. To require nondiscriminatory treatment in a bargaining unit is no different, in principle, from requiring specific performance of an agreement to arbitrate. Neither contravenes any prohibition or policy of the Norris La Guardia Act. On the contrary, the decree for specific performance of the agreement to arbitrate effectuates the policy of the Act. (See 29 U. S. C. Section 108) *Wilson Bros.* v. *Textile Workers Union*, 132 F. Supp. at 165-166 (S. D. N. Y. 1954).

Petitioner argues that the action of Congress in refusing to repeal the Norris La Guardia Act as applied to Section 302 of the House Bill (which as amended became Section 301 of the Act) shows that Congress was unwilling to pay the price of making the Norris La Guardia Act inapplicable in order to allow federal courts to enforce collective bargaining agreements. But Section 301 of the

Labor Management Relations Act is not coextensive with the Norris La Guardia Act. Some breaches of contract, such as a strike in violation of a no-strike clause or an arbitration clause which is a virtual no strike clause, are non-enjoinable under the Norris La Guardia Act. *W. L. Mead* v. *Teamsters Union*, (C. A. 1, 217 F.2d 6, (1954)). Equitable relief, however, with respect to other breaches of contract may be granted in terms which do not trench upon the interdictions of the Norris La Guardia Act. *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, supra; see *Sanford* v. *Boston Edison*, 316 Mass. 631, *Sykes* v. *Oil Workers International Union*, supra. The refusal of Congress to repeal the Norris La Guardia Act in connection with Section 301 simply means, as we point out more fully in our discussion of the legislative history of Section 301 (Point II *infra* pp. 24-25, 31-33) that Section 301 confers jurisdiction on the federal courts to entertain suits for legal and equitable relief in cases of breach of a collective bargaining agreement, except where the Norris La Guardia Act is applicable by its terms (R. 62).

Petitioner further argues that the decision of the Court below applies not only to arbitration clauses, but opens up the whole field of labor contracts to policing by injunctive process of a scope which cannot now be foreseen. (R. 61-62). This argument is not a valid reason for denying relief where it is warranted. It goes to the wisdom of making collective bargaining contracts valid, binding and enforceable. As to this, the Congress which enacted the Labor Management Relations Act of 1947 has already spoken. S. Rept. No. 105 80th Cong. 1st sess. pp. 15-17; H. Rept. No. 245, 80th Cong. 1st sess. p. 46. There is no indication in the legislative history of the Labor Management Relations Act that Congress intended to expand the Norris La Guardia Act to thwart that intent.

Finally, petitioner insists that the holding of the Court

below results in a policy of inequality which is at variance with Congressional policy, in that the practical effect of the Court's holding is to make arbitration agreements enforceable only as against employers, whereas the chief object of Congress in 1947 was to provide equality of treatment between employees and employers. (Br. 61-64). As the Court below pointed out, however, an order to compel arbitration can be granted against either party, without violating the Norris La Guardia Act. In the situation where the union strikes in violation of an arbitration promise, the employer is not without remedy. He may have available injunctive remedies in the state court, and he unquestionably has remedies in the Federal courts, although not the remedy of injunction. See *Mead* v. *International Brotherhood of Teamsters* (C. A. 230 F.2d 526 (1954)). Moreover, although the Norris La Guardia Act was not intended as a "one way street", it was primarily intended as a protection to union and employee activities. "The purpose of the bill is to protect the rights of labor in the same manner that Congress intended when it enacted the Clayton Act . . . which Act, by reason of its construction and application by the Federal Courts is ineffective to accomplish the Congressional intent" H. Rept. 669, 72nd Con. 1st sess. p. 3. "The Norris La Guardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as defined by the later Act." *United States* v. *Hutcheson*, 312 U. S. 219, *Milk Drivers Union* v. *Lake Valley Farm Products*, 311 U. S. 91. To make mutuality of remedy a requirement, under these circumstances, would be to contravene an unambiguous policy of Congress.

In any event, the equal treatment for which respondent argues would not effectuate any policy of Congress. What it seeks is either the right to enjoin a strike in violation of a contract, if it is required to perform its agreement

to arbitrate, or the right not to perform its agreement to arbitrate, as the price of permitting the union the right to strike in violation of its contract. Equality of treatment under the first alternative would violate the policy of the Norris La Guardia Act; equality of treatment under the second would violate the policy of the Labor Management Relations Act. No public policy is served by such an approach.

The Court below chose not to rest its decision on the term used to describe the order to arbitrate, whether as a decree for specific performance or a mandatory injunction. There is, however, strong separate support in the legislative history, the text of the Act and the cases for the view that the Act was intended to bar only prohibitory and not mandatory injunctions of the kind here sought. See *Virginia Ry. Co.* v. *System Federation* No. 40, 300 U. S. 515; *Graham* v. *Brotherhood of Firemen*, 338 U. S. 232; *Sanford* v. *Boston Edison Co.*, 316 Mass. 631, 637-8; the George Amendment 75 Cong. Rec. 4772[1]; and the specific

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[1] On February 26, 1932, Senator George introduced the following amendment: (75th Cong. Rec. 4772)

> "No court of the United States shall have jurisdiction, upon the hearing of an application for an interlocutory injunction, to grant a mandatory injunction compelling the performance of an act in any case involving a growing out of any labor dispute as hereinafter defined."

Senator Norris, the sponsor and prime mover of the legislation in the Senate, stated:

> "Mr. President, as I understand the amendment—I think I understand it—I have no objection to it and I think it would very materially improve the bill, if agreed to . . ." (*ibid*, p. 4772)

Senator George then explained the amendment as follows:

> "The true function of an injunction is to restrain anyway, but the practice has grown up of compelling the doing of affirmative acts; and in all labor disputes, beyond the peradventure of a doubt, an interlocutory injunction should not include the requirement that any affirmative act be done by any party to that dispute.

interdictions in the text of Sections 4, 7 and 9 of the Act which forbid only prohibitive and not mandatory injunctions.

The history of the George Amendment shows that (1) the amendment added a prohibition, not elsewhere in the bill, against preliminary mandatory injunctions. As Senator Norris stated: "I think it would very materially improve the bill if agreed to". (75 Cong. Rec. p. 4772); (2) the prohibition was limited to the issuance of mandatory injunctions upon an interlocutory hearing, and as Senator George stated, "There is no attempt in this amendment to curb or restrict the power of the Federal Courts to grant a mandatory injunction" on final hearing (*ibid* 4772); and (3) even this limited prohibition against the issuance of mandatory injunctions was not included in the conference report and the bill, as finally enacted, contains no prohibition under the injunction sections against the issuance of any mandatory injunction.

Obviously, it is the substance of the order, not the label

"In many States, or at least in some States, mandatory injunctions are forbidden until final trial. This amendment simply provides that in labor disputes, as defined in this act, no court of the United States shall have the power to issue a mandatory injunction compelling an affirmative act upon an interlocutory hearing. Of course, the court would have the power in a proper case to restrain until final hearing or final trial; and in that event there is no attempt in this amendment to curb or to restrict the power of the Federal courts to grant a mandatory injunction." (*Ibid.* p. 4772)

The amendment was amended by making the prohibition applicable also upon the hearing of an application for a temporary restraining order, and as thus amended was agreed to by the Senate (75 Cong. Rec. Pt. 5 pp. 4772-4773), and became Section 6 of the Senate Bill. The House bill, however, did not contain any such provision. In conference, the conferees dropped the Senate amendment and the bill became law without it. See 72nd Congress 1st Sess. Sen. Doc. No. 71 Conf. Rept. March 14, 1932; H. Rept. No. 793, Conf. Rept. March 14, 1932; H. Rept. No. 821, Conf. Rept. March 16, 1932; 75 Cong. Rec. pp. 5549-50, 6336-7. See Witte: The Federal Anti-Injunction Act 16 Minn. Law Review 638.

attached to it which determines whether the Norris La Guardia Act applies. A no-strike clause could not be enforced by the simple device of labelling the court's order a decree for specific performance rather than an injunction, since the order, however labelled, would run up against the prohibition of Section 4 of the Act. By the same token, however, an order to enforce an arbitration clause should not be denied by the simple device of labelling it an "injunction" rather than a decree for specific performance, since the order neither involves nor seeks to enjoin any of the activities made non-enjoinable by Section 4 or conditionally non-enjoinable by Sections 7 and 9.

II. Section 301 of the Labor Management Relations Act of 1947 Confers Jurisdiction on the District Court and the District Court Is Authorized to Compel Specific Performance of the Agreement to Arbitrate in the Collective Bargaining Contract Herein.

The Court below held that Section 301 conferred jurisdiction over the subject matter of the suit herein, under *Association of Westinghouse Employees* v. *Westinghouse Electric Corporation*, 348 U. S. 437, because the Union is here seeking a remedy for a breach of the promise to arbitrate which runs to the union, *qua* union, and not a right which the individual employee equally could enforce on a suit on his personal cause of action. (R. 80-81). The Court also held that "in a Section 301 case, the *Erie, York* and *Bernhardt* decisions do not require us to apply state law concerning the 'forms and mode' of enforcing an arbitration agreement" (R. 81) and that the availability of specific performance is a matter not of right, but of remedy, and is governed by the federal law of the forum. (R. 70).

The Court concluded, however, that Section 301 was not itself a legislative authorization for decrees of specific per-

formance of arbitration agreements. "We think that is reading too much into the very general language of Section 301. The terms and legislative history of Section 301 sufficiently demonstrate, in our view, that it was not intended or to deny any applicable existing remedies . . . Arbitration was scarcely mentioned at all in the legislative history . . . The most that could be read into it would be that it authorizes equitable remedies in general, including decrees for specific performance of arbitration agreements . . . (R. 73). As additional support, the Court referred first, to the "hoary though probably misguided judge-made reluctance to give full effect to arbitration agreements" (R. 72-73) which it believed could not be ignored as a matter of federal law without a more explicit statutory basis than that provided by Section 301 "and second, to the "practical grounds" that Section 301 lacks "the comprehensive and consistent scheme that legislative action could afford and which is necessary for effective, yet safeguarded arbitration." (R. 73).

The Court's reluctance to employ the grant of authority which it finds in § 301 to award the relief here requested is based, we think, on insufficient grounds. Before discussing those grounds, we turn first, to petitioner's argument that the District Court entirely lacked jurisdiction of the suit herein under § 301 (Br. 52), and second, to its argument that, in any event, the sole purpose of § 301 was to authorize damage actions, without making available equitable remedies of any kind. (Br. 44-48).

A. *The District Court Had Jurisdiction of the Suit Herein Under Section 301.*

The petitioner asserts that since the union is here seeking to enforce the right of Mr. Boiardi to receive a higher rate of pay and of Mr. Armstrong to be reinstated after his discharge, the District Court had no jurisdiction of

the suit, under the decision of this Court in the *Westinghouse* case, because that case held that Sec. 301 did not authorize suits in the federal courts to enforce the personal rights of employees. It argues that these rights are no less personal to the employees because the union seeks to enforce them by compelling arbitration than by a suit for a declaratory judgment as in *Westinghouse* (Br. p. 52).

The decision of the majority in *Westinghouse* was that Sec. 301 did not authorize the union to sue on behalf of the employees for accrued wages, 348 U. S. at 461, or to enforce in a federal court the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer (*id* at 461) or to sue on a claim for wages for employees arising from separate hiring contracts between the employer and each employee (*id* at 464). The Court did not discuss or decide whether a declaratory judgment was warranted.

Here, the complaint states a claim based on the violation of a promise by the employer to the union to arbitrate, as the final step in the contract grievance procedure, which the employer and the union alone administer (Art. XII, 1, Steps 3-4; 2; Art. XIII, R. 32-33). By its terms, the contract excludes employees from the arbitration clause. Only the Union and the Company may submit a matter to arbitration and the only parties to the arbitration itself are the Union and the Company, each of which has agreed on the method of selecting the arbitrator, the scope of arbitration, the division of the costs, and the final binding and conclusive effect of the award upon the parties. (R. 32-33). The complaint makes no claim that the Company has failed to pay employees accrued wages, or has violated the individual contracts of hire. The claim is that the Company has refused to arbitrate in violation of its agreement to arbitrate as set forth in Article XIII of the contract. (R. 45, 46).

Moreover, the arbitration clause is linked with the no-strike clause, which prohibits strikes in connection with any matter subject to the grievance procedure, unless the strike is called over a grievance which has been processed through the grievance procedure and arbitration has not been resorted to under the contract. In both the arbitration and no-strike clauses, the benefits and obligations run to the union, *qua* union, and to the employer. The personal rights of individual employees are not directly involved, and in most jurisdictions could not be enforced without prior action by the Union under the arbitration clause. See *Cox: Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 648 (1956).

B. *Section 301 Grants Authority in Its Own Terms to Compel Specific Performance of an Agreement to Arbitrate Herein.*

1. The Legislative History and Policy.

While the legislative history of the statute is unclear or silent as to many matters, it is not accurate to say, as the Court below did, that "arbitration was hardly mentioned at all in the legislative history". (R. 73). On the contrary, Title II of the Act makes it the policy of the United States to encourage the inclusion in collective bargaining agreements of provisions for the final adjustment of grievances regarding the application or interpretation of such agreements and otherwise to facilitate the use of voluntary arbitration as a part of the collective bargaining process (Section 201 (b) and (c)). And the problem of the rights and remedies arising out of the breach of an agreement to arbitrate, along with breaches of collective bargaining contracts, was considered under both Title II and Title III of the Act. Indeed, the legislative history goes far toward showing that both

Houses of Congress intended that agreements to arbitrate should be valid, binding and enforceable and that remedy of specific enforcement should be available as a federal remedy. The issue on this score was only over the question of whether the remedy should be both by way of an unfair labor practice and a private suit or by private suit alone. This issue was resolved in conference in favor of a private suit alone.

Thus, the Senate bill (S. 1126) made it an unfair labor practice for either an employer or a labor organization to violate the terms of a collective bargaining agreement or an agreement to submit a labor dispute to arbitration (Sections 8(a) (6) and 8(b) (5)). The Board was given full authority to issue the necessary cease and desist and affirmative orders to remedy violations (Section 10(c) and (h)). This, in effect, would have authorized the Court of Appeals to enforce a Board order granting specific performance of an agreement to arbitrate.

Section 301 of the bill was regarded as providing a similar right to the parties to obtain specific enforcement of such agreements by private suit in the District Court. The Senate Report plainly indicates that the rights and remedies under Section 8 (a) (6) and 8 (b) (5) were to be correlative with those under Section 301 (S. Rep. No. 105, 80th Cong. 1st session). It states that "Section 301 relates to suits by and against labor organizations for breach of collective bargaining agreements and should be read in connection with the provisions of Section 8 of Title I also dealing with breaches of contract. (*id* at p. 30). While Title III of the Committee bill treats this subject by giving both parties the right to sue in the United States District Court, the committee believes that such action should also be available before an administrative body" (*id* at p. 20-21). Since the action before the administrative body made available for breach of an agreement to arbitrate was made an unfair

labor practice by Sections 8 (a) (6) and 8 (b) (5) of the bill, which would result in effect in a Court of Appeals decree of specific performance, it is a proper inference that the Committee intended a similar remedy to be available to private litigants in the District Court under Section 301. The Senate Minority Report did not dispute this intention, but objected to it on the ground that it gave the parties a choice of bringing their action before the Board or the District Courts, and the necessity for uniformity and the avoidance of conflict in judicial decisions made the scheme undesirable (S. Min. Rep. No. 105, Pt. 2 on S. 1126, 13).

This view is confirmed by the further language of the Report with respect to Section 301, under the hearing "Enforcement of Contract Responsibilities". "The committee bill makes collective bargaining contracts equally binding and enforceable on both sides. In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in Title I.) We feel that the aggrieved party should also have a right of action in the federal courts. Such a policy is completely in accord with the purposes of the Wagner Act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employment contract binding on both parties should be made'. . ."

In this, it is evident that the Committee gave the same content to Section 301 as it had clearly given to Sections 8 (a) (6) and 8 (b) (5), under the same policy of compelling a binding agreement.[2]

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[2] See comment of Senator Morse, objecting to the elimination in conference of Secs. 8(a)(5) and 8(b)(6), on the ground that these sections and Sec. 301 provided alternative procedures, and both should be retained. "I am further disappointed in the conference report bill

The Report further noted that "to encourage the making of agreements and to promote industrial peace through faithful performance by parties, collective agreements affecting interstate commerce should be enforceable in the federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal Courts in disputes affecting commerce . . ." The Committee pointed out the difficulty in bringing such suits was that "There are no federal laws giving the employer or even the Government itself any right of action against a union for any breach of contract. Thus, there is no substantive right to enforce in order to make the union suable as such in Federal courts . . . Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements and will thereby promote industrial peace. . ." (*id* at pp. 15-17).

From the foregoing, it appears that Senate bill not only sought to give parties similar rights and remedies in cases brought before the Board and in the District Court, with respect to violations of collective agreements and agreements to arbitrate, but that it declared as a matter

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in that it has digressed from a very vital provision which we had in the Senate bill, a provision which members of the Committee know I argued for at some length. It was in and out of the bill, but we finally got it back into the bill. It offered an alternative procedure for the handling of violations of contracts, either on the part of the union or the part of the employer, by making such violations unfair labor practices. I was willing to go along with the court action proposal, as an alternative if conditions became so bad in the relationship between an employer and a union that the employer felt that he could not settle the differences by collective bargaining or the administrative procedures of the National Labor Relations Board through bringing a charge of unfair labor practice. But I felt that we ought to have both the unfair labor practice procedure and the court suit procedure as alternative procedures." (93 Cong. Rec. 1558 June 5, 1947 80th Cong. 1st Sess.)

of substantive law, the validity and enforceability of such agreements in language paralleling the substantive language of Section 2 of the United Arbitration Act.[3]

The House bill took a similar approach (H.R. 3020, 80th Cong. 1st Sess.). It defined (Sec. 2(11)) the terms "bargain collectively" and "collective bargaining" as meaning "(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such dispute, following such procedure"... ; and it made it an unfair labor practice for employers, employees or their representatives "to refuse to bargain collectively" (Sections 8(a) (5), 8(b) (2)).

Title III of the House Bill provided under the heading "Equal Responsibility and Liability" in Section 302(a):

"Any action or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the Court otherwise has jurisdiction of the cause."

and in Section 302(e) that in such actions or proceedings, the Norris-LaGuardia Act shall not have any application in respect of either party.

H. Rep. No. 245 stated the purpose of the two proposals as follows:

As to Section 2 (11) A, "when parties have agreed upon a procedure for settling their differences, and the agreement is in effect, they will be required to follow the procedure or be held guilty of an unfair labor practice. Most

[3] "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any such contract (9 U. S. C. Section 2).

agreements provide procedures for settling grievances, generally including some form of arbitration, as the last step. Consequently, this clause will operate in most cases, except those involving the negotiation of new contracts." (p. 21)

As to Section 302 (a), "when labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens. . . . For this reason, not only does the section, as heretofore pointed out, make the labor organization equally suable, but it also makes the Norris La Guardia Act inapplicable in suits and proceedings involving violations of contract, which labor organizations voluntarily and with their eyes open enter into." (p. 46).

From the foregoing, it is evident that Section 302(a) of the House Bill, like Section 301(a) of the Senate Bill, was intended to give parties to a collective bargaining or arbitration agreement, rights and remedies in the District Courts by private suits correlative to their rights and remedies in proceedings before the Board under Sections 2(11), 8(a) (5) and 8(b) (2) of the House Bill and Sections 8(a) (6) and 8(b) (5) of the Senate Bill. It is, of course, entirely clear that Section 302(a) of the House Bill authorized full legal and equitable relief, within the terms of the section, since if it were limited to damages, it would not have been necessary to propose repeal of the Norris La Guardia Act as in Section 302 (e) of the House Bill.

In conference, however, both Senate and House proposals to make an unfair labor practice of a violation of a collective bargaining agreement or an agreement to arbitrate were eliminated. Section 302(e) of the House Bill was also eliminated except for the provisions embodied in Section 301 (e) of the Act (H. Conf. Rep't. No. 510, pp. 41-2, 66)

and Section 301(a) of the Senate Bill was retained with the explanation that "Once the parties have made a collective bargaining contract, the enforcement of that contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." (*id* at p. 35) [4]

Petitioner argues that the conference agreement, eliminating the proposed unfair labor practice, shows that the Congress "deliberately stopped short of providing enforcement of such agreement through judicial or other process." (Brief, p. 48) And it attempts to support this position by an excerpt from the Conference Report, relating to a different Section 8(d) and dealing, not with rights and remedies in suits under Section 301 but with proposed unfair labor practices which the Conference Report eliminated (Br. p. 47, 1st paragraph) (Cf. H. Conf. Rept. No. 510 on H.R. 3020, 80th Cong. 1st Sess. p. 35, with Section 8(d), S. 1126 and Section 8(d) of the Act). This argument ignores the fact that although the Congress which enacted the Labor Management Relations Act was unwilling to have the Board compel arbitration, it was not in the least unwilling to allow the enforcement of arbitration or collective bargaining agreements by the Courts. (93 Cong. Rec. 6600) And, so far as its legislative history shows, it gave the courts the

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[4] In construing a similar phrase in the Massachusetts statute G. L. (Ter. Ed. C. 150, Sec. 11) providing that arbitration agreements are valid and enforceable by "proper judicial proceedings", the Supreme Court held that:

> "The defendant's position is that under the statute 'proper judicial proceedings' for an award of money can only mean actions at law. This overlooks, however, both the nature of the contract and the purpose of the statute. The contract purports to afford a prompt and peaceful settlement of labor disputes, in part by resort to arbitration. . . . If the equitable remedy should be ruled to be unavailable to the plaintiffs, the alternative would be strife or delay attending a strike. . . . Such a restricted interpretation of the legislative intent would not be reasonable." *Magliozzi* v. *Handschumacher Inc.*, 327 Mass. 569, 99 N.E. 2d, 586.

unambiguous direction to treat such agreements as "valid, binding and enforceable" (S. Rept. No. 105, p. 17).

The result of the conference agreement was thus to confer jurisdiction on the courts, under Section 301(a), to entertain suits for and grant both legal and equitable relief, except where the Norris La Guardia Act applies.

Section 301(a) of the Senate bill appears to have been intended to reach precisely this result, although in other proposed sections, the Senate sought but ultimately abandoned the attempt to achieve wider authority to have the Courts of Appeal, on Board orders, grant full preventive and affirmative relief against violations of collective bargaining and arbitration agreements.

Section 302(a) of the House Bill was also unquestionably aimed at reaching this result, but without the restrictions of the Norris La Guardia Act. When the House agreed in conference to drop its proposal to make the Norris La Guardia Act inapplicable, and both Houses abandoned their proposals to make violation of collective bargaining and arbitration agreements unfair labor practices, Senate Section 301 (a) and House Section 302(a) were brought into harmony and Senate Section 301(a) was adopted with the technical jurisdictional features of the Senate Bill. The consequence of these modifications was to deny employers and unions the right to obtain equitable relief against each other without compliance with the applicable provisions of the Norris La Guardia Act and when this not possible to remit them to an action for damages[5] but nothing

[5] It is submitted that this is the explanation of the statement on this score by Senator Taft in his summary of the principal differences between the conference agreement and the bill which the Senate passed (93 Cong. Record June 5, 1947, p. 6600) (Cited by Petitioner in its Brief p. 44). Senator Taft stated that the House conferees objected to Section 8(a) (6) and 8(b) (5). He then stated that "The provisions of the Senate amendment which conferred a right of action for damages upon a party aggrieved by breach of a collective bargaining agreement

in the legislative history requires that Section 301(a) be construed as depriving the Courts of jurisdiction to grant equitable relief where such relief does not trench upon the interdictions of the Norris La Guardia Act. And nothing in the Norris La Guardia Act has application, as we have already pointed out, to deprive the Courts of jurisdiction in a suit by a labor union against an employer to obtain the mandatory relief here sought to require the employer specifically to perform its agreement to arbitrate.

These conclusions from the legislative history are made more weighty in the light of the legislative purpose in adopting Section 301, which was "obviously to prescribe an "effective method of assuring freedom from economic warfare for the term of the agreement' and 'to encourage the making of agreements and to promote industrial peace through faithful performance by the parties (of) collective bargaining agreements . . . enforceable in the federal courts'. Sen. Rept. No. 105, 80th Cong. 1st Sess. 16." . . . The legislation intends "the maximum degree of enforcement of arbitration contracts." *Textile Workers v. American Thread Co.*, 113 F. Supp. 137.

If all that Section 301 authorizes are actions for damages, it is difficult to see why the Committee Reports do not simply say so. The intent in both the House and the senate

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were retained in the conference agreement (Section 301)". This statement does not purport to be more than a short-hand reference to the Section as a whole, which in Section 301(b) contains specific reference to liability for damages and money judgments and it does not fully or accurately reflect the discussion of Section 301 in Sen. Rept. 105, pp. 15-16, 20-21, 23. Moreover, Senator Taft in the following sentence stated with respect to Sections 8(a) (6) and 8(b) (5) on the one hand and Section 301 on the other, "If both provisions had remained there would have been a probable conflict of remedies and decisions." This latter statement is intelligible only if it is understood to mean, as the Senate Report indicates, that private litigation under Section 301 authorizes some equitable remedies. Otherwise, there would have been no conflict of remedies, since the Board is not authorized to award damages as such.

in their versions of Section 301 was certainly to authorize more, and the legislative history, while not altogether free from doubt, is more consistent with an interruption which would permit the specific enforcement of an agreement to arbitrate, in accordance with the declared policy of the Act, to encourage arbitration, than with an interpretation contrary to that policy which would remit the parties to actions for damages alone.

2. The context.

The language and context of Section 301 confirms the conclusion based on its legislative history that it confers jurisdiction on the District Courts with authority to grant affirmative and equitable relief, except where the Norris La Guardia Act applies and is not limited to damages. To those courts which construe the statute as creating substantive rights, the unqualified use of the word "suits" in Section 301(a) as a generic term of comprehensive significance (see *Kohl v. United States*, 91 U.S. 375 and *Cohens* v. *Virginia*, 6 Wheat 405) lends support to the view that it "authorizes injunctive process for the full enforcement of the substantive rights created by Section 301(a) . . ." *Milk Drivers Union* v. *Gillespie*, 203 F.2d 650 (C.A. 6, 1953).

In the context of the remaining sections of the Act, this meaning is unaffected. Thus, when the Act intended to limit recovery to damages, as in Section 303(b), it found appropriate language readily available. See *Bakery Sales Drivers v. Wagshal*, 333 U.S. 437; H. Conf. Rep't. No. 510 on H.R. 3020 p. 67; Katz and Jaffee *"Enforcing Arbitration Clauses by Section 301, Taft Hartley Act"* 8 Arbitration Journal 80.

Moreover, Section 301(b) which contains a provision permitting a labor organization to sue or be sued as an entirety and in behalf of employees whom it represents

in the courts of the United States, contains limitations with respect to damages, applicable only to labor unions and does not purport to limit the equitable relief which is afforded in Section 301(a) against employers. Thus, the Senate Report makes it clear that Section 301(b), as well as Section 301(c), (d) and (e) are specifically designed to overcome procedural difficulties which render suits against unions difficult and to provide an appropriate means for enforcing judgments for damages. (Sen. Report No. 105, pp. 16-17). Nowhere, in these sections, is there any language or intent to limit Section 301(a) to actions for damages in suits by unions against employers under Section 301(a). Moreover, Sections 301(b) through (e) were intended to apply generally to labor unions alone, as distinguished from Section 301(a) which by its terms is applicable to employers and labor unions alike, but only in suits for violations of contracts, under the special limitations there described. These subsections are thus hardly to be construed as limiting the meaning of the words "suits" in Section 301(a) to deny equitable relief against employers (H. Conf. Rep't. No. 510, p. 66).

In the light of these considerations, a majority of courts have construed Section 301(a) as authorizing equitable and other affirmative relief, as well as damages, in suits by labor organizations against employers for violation of collective bargaining contracts both before and after the decision of this Court in the *Westinghouse* case.[6]

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[6] *Wilson Bros.* v. *Textile Workers Union* (D.S.D.N.Y. 1953) appeal dismissed for procedural cause 224 F.2d 176 (C.A. 2, 1955); *UE* v. *Landers, Frary and Clark*, D. Conn. 119 F. Supp. 877 (1954); *Textile Workers Union* v. *Aleo Mfg. Co.*, (D.M.D.N.C.) 94 F. Supp. 626; *Local 379* v. *Jacobs Mfg. Co.*, (D. Conn.) 120 F. Supp. 228; *Mt. States Div.* v. *Mt. States Tel. Co.*, (D. Colo.) 81 F. Supp. 397; *Evening Star Newspaper Co.* v. *Columbia Typographical Union*, (D.C.D.C.) 124 (1954) F. Supp. 322; *Insurance Agents* v. *Prudential Ins. Co.*, (D.C.E.D.Pa.) 122 F. Supp. 869; *United Automobile Workers* v. *Buffalo Springfield Roller Co.*, (D.S.D. Ohio) 131 F. Supp. 667; *Textile*

C. The District Court With Jurisdiction Under Section 301 Has Inherent Power as a Court of Equity to Compel Specific Performance of the Agreement to Arbitrate Herein.

If Sec. 301 is regarded as not providing a sufficiently firm statutory basis upon which to grant specific performance of the agreement to arbitrate herein, an appropriate source of such authority may be found in the inherent power of the federal equity court to mould its relief, in cases over which it has jurisdiction, with all the power of the Court of Chancery, to effectuate declared policy in the field of labor relations. See Brown, J. (dissenting opinion) *Textile Workers Union of America* v. *Lincoln Mills of Alabama*. No. 211 October Term, 1956 Transcript of Record, pp. 55, 58-66.

The objection is raised by the petitioner that such authority is lacking because it would contravene "a fundamental and long settled principle of contract law", never changed, except as the result of the particular terms of a statute, that contracts to arbitrate future disputes under a contract are not specifically enforceable (Br. 38-39).

Petitioner is mistaken. The rule is neither fundamental nor settled. Judge Cardozo in upholding the validity of the New York Arbitration Act, in 1921, characterized it as "the ancient rule" which "with its requirements and exceptions was criticized by many judges as anomalous and unjust . . . It was followed with frequent protest, in deference to early precedents. Its hold, even upon the common law, was hesitating and feeble . . . The judges

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Workers Union v. *American Thread Co.*, (D.C. Mass.) 1954 113 F. Supp. 137; *Local 19* v. *Buckeye Cotton Oil Co.*, (C.A. 6) 236 F.2d 776 (1956); *Textile Workers Union of America* v. *Arista Mills Co.*, (C.A. 4), 193 F.2d 529); see *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, (C.A. 3), 235 F.2d 401; *Mendelsohn: Enforceability of Arbitration Agreements Under Taft-Hartley Section 301*. 66 Yale L. J. 167 (1956).

might have changed the law themselves if they had abandoned some early precedents as at times they seemed inclined to do. They might have whittled it down to nothing as indeed was done in England, by distinctions between promises that are collateral and those that are conditions" (citing cases). *Berkowitz v. Arbib*, 230 N.Y. 261.

It is "hoary and probably misguided" (Magruder, J. R. 72); it "rests on merely weak historical arguments" (Wyzanski, J., *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137. It is "an anachronism of our American law" H. Rep. No. 96, 68th Cong. 1st Sess. "See the adverse comments of Judge Hough in *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 F. 1006 against what he assumed to be the law in the federal courts and compare with the shift in judicial attitude reflected by the reservation of this question in Mr. Justice Brandeis' opinion in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 44 S.Ct. 274, 68 L.ed. 582" (Frankfurter, J. (concurring opinion) *Bernhardt* v. *Polygraphic Company of America*, 350 U.S. 205 at 210. See *Kulukundis Shipping Co.* v. *Amtorg Trading Corporation*, 126 F.2d 978, 982-984 (C.A. 2)).

Since "the vigorous legislative movement" which "got under way in the 1920's expressive of a broadened outlook of view on this subject", the encouragement of arbitration as a governmental policy in enactments relating to labor relations matters has been consistent[7] and

[7] 44 Stat. 577 (1926) 45 U.S.C. Sec. 157-159 (Railway Labor Act) 47 Stat. 72 (1932) 29 U.S.C. Sec. 101, 108, (Norris La Guardia Act). See Sen. Rept. No. 163 p. 25, Pt. 1, p. 27, Pt. 2, p. 13; H. Rept. No. 669 p. 10, 72nd Cong. 1st sess.; 49 Stat. 449 (1935) 29 U.S.C. Sec. 151 (National Labor Relations Act); 49 Stat. 1189, (1936), 45 U.S.C. Sec. 181 et seq. (Carriers by Air Act); 61 Stat. 136 (1947) 29 U.S.C. Sec. 151, 171-178, particularly Secs. 171, 173(d) (Labor Management Relations Act of 1947). See Mendelsohn, *Enforceability of Arbitration Agreements under Taft-Hartley Section 301*, 66 Yale L. Rev. 167, at 178 ftn. 45 (1956); Plock. *Methods Adopted by States for Settlement of Labor Disputes, without Original Recourse to Courts 34 Iowa L. Rev.* 430 (1949).

the use of arbitration has been fostered by governmental agencies, and the courts.[8]

Arbitration clauses are now in widespread use in collective bargaining agreements,[9] and serve an important function as a substitute for the strike or lockout, in the settlement of disputes that might otherwise erupt in industrial strife. Under these circumstances, to hold that agreements to arbitrate in collective bargaining contracts are

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[8] The importance of including an arbitration procedure in collective bargaining agreements was stressed both by the President's Labor Management Conference in 1945, Committee VI *Report*, in 3 President's National Labor Management Conference 139-143 and by the War Labor Board, whose position is summarized in Comment 5 C. C. H. Lab. L. Rep. Par. 51904 at 51035 (1954). The National Labor Relations Board has developed a policy of declining jurisdiction over unfair labor practice charges of unilateral action in violation of the recognition clause of a collective bargaining contract, where arbitration procedures are available under the contract, to the end that "Every encouragement should be given to the making and enforcement of such clauses." *Matter of W. L. Mead Inc.*, 113 N.L.R.B. 109 (1955); *Spielberg Mfg. Co.*, 112 N.L.R.B. 139 (1965); *United Telephone Co.*, 112 N.L.R.B. No. 103 (1955); *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 706-7 (1943) modified on other grounds and enforcement granted 141 F.2d 785 (C.A. 9, 1944); Note: *Jurisdiction of Arbitrators and State Courts over conduct constituting Both a Contract Violation and an Unfair Labor Practice*, 69 Harv. L. Rev. 725; *United Electrical Radio and Machine Workers of America, Local 259* v. *Worthington Corp.*, 236 F.2d 364 (C.A. 1, 1956); *Post Publishing Co.* v. *Cort*, 1956 Mass. A.S. 614; *Leonard* v. *Eastern Mass. Street Railway Co.*, 1957 Mass. A.S. — January 21, 1957.

[9] See N. Y. Times p. 71 Jan. 2, 1957 "*Court Jam Eased by Arbitration*", Report of American Arbitration Association for 1956, indicating that it handled a record number of 2500 labor disputes over contract terms and 600 commercial cases during the year. In a study of collective bargaining agreements by the Bureau of Labor Statistics, nearly ninety per cent were found to contain arbitration clauses. See Nix, Theodore & Wolk, *Grievance Procedures in Union Contracts*, 1950-1951, 73 Monthly Lab. Rv. 36, 39 (1951); *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, Brown J. (dissenting opinion), Transcript of Record p. 66-8, ftn. 14, at 66-7. A private survey by the Bureau of National Affairs in 1956 showed ninety-one per cent of the agreements surveyed provided for arbitration of some kind. *Collective Bargaining Negotiations and Contracts* 51:7.77:1.

unenforceable, though the court has jurisdiction and the Congressional purpose is to encourage such enforcement is to make mortmain the policy of the law and subvert the purposes of the statute. If a union which agrees not to strike in return for an agreement to arbitrate is denied specific enforcement of the promise to arbitrate, it may still be bound by the no strike clause, and liable in damages for its violation. The practical consequences of such a decision are that unions will reject both arbitration and no strike clauses and resort to their economic weapons in the absence of a *bona fide* facility for the peaceful settlement of disputes through arbitration. This is particularly true, if the arbitration clause, standing alone, constitutes a virtual no strike clause and the union can be held in damages for the consequences of a strike in violation of the arbitration clause alone. *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, 230 F.2d 526 (C.A. 1, 1956). This is contrary to the purpose and policy of the statute.

A second objection mentioned by petitioner and the Court below is that Sec. 301 lacks the procedural specifications needed for the power to compel arbitration (R. 73) and petitioner raises the spectre of judicial law-making in the field of labor arbitration (Br. p. 50). Historically, this objection comes too late. The courts have been engaged in extensive regulation of labor relations, including, incidentally, labor arbitration, for more than a decade, and have, under their general equity powers, been alert to adapt the remedies to the needs of the cases before them. See *Textile Workers Union* v. *Lincoln Mills of Alabama*, Brown, J. (dissenting opinion) No. 211, October Term 1956, pp. 64-65, 58-59; *N. L. R. B.* v. *Standard Oil Co.*, 196 F.2d 892 (C.A. 6, 1952); *Timken Roller Bearing Co.* v. *N. L. R. B.*, 161 F.2d 949 (C.A. 6, 1947); *N. L. R. B.* v. *Corsicana Cotton Mills*, 179 F.2d 234, 235; *Textile Workers Union* v. *Ameri-*

can Thread Co., 113 F. Supp. 137; *Goodall Sanford Inc.* v. *United Textile Workers*, 131 F. Supp. 767; See *Texas & N. O. Ry. Co.* v. *Brotherhood*, 281 U.S. 548. "Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And, it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. (citing cases)" *Bell* v. *Hood*, 327 U.S. 678.

Nor is a court the only source of a practical scheme (R. 73) to make arbitration effective. Employers and unions have devised and are quite capable of devising such methods for the settlement of their disputes. The facilities of the Federal Mediation and Conciliation Service, under Title II of the Act, are available, and the contract in the case at bar (Art. XIII 2, R. 33) is designed to use the facilities of that Service, in case the parties are unable to agree on the choice of an arbitrator. In the *Lincoln Mills* case, the contract provides for reference to the American Arbitration Association for assistance in the selection of an arbitrator, and makes the arbitration therein subject generally to the rules, regulations and procedures of that Association. (No. 211, October Term 1956, Transcript of Record, p. 17) In *Signal-Stat. Corp.* v. *United Electrical Radio and Machine Workers of America* (C.A. 2, 235 F.2d 298) the agreement provides for the arbitrators to be appointed by the New York State Board of Mediation. See also the procedure agreed upon in *International Brotherhood of Teamsters* v. *W. L. Mead, Inc.*, 230 F.2d 526 C.A. 1; *Post Publishing Co.* v. *Cort*, 1956 Mass. A.S. 641, 134 N.E.2d 431.

Indeed, as petitioner itself suggests, the nature of labor arbitration is such that "certain legalistic features of the

Arbitration Act—such as the subpoena power, depositions, cross examination, etc.—are inappropriate to the purpose of a labor arbitration" (Br. p. 30).

Typically, a labor arbitration deals with wages, hours and working conditions, with contract provisions concerning seniority, layoffs, discharges, pensions, work loads, pay classifications and job descriptions, shop rules, vacation pay, call-in pay, and a variety of similar problems of day to day relations between the union and the employer under the contract. These are matters usually within the immediate knowledge of the parties, which they are required to consider in the grievance procedure before reaching the stage of arbitration.

The procedural provisions of the United States Arbitration Act are usually unnecessary in the arbitration of these matters. Labor arbitration is a method of handling grievances as a substitute for a strike, and not a substitute for litigation, although the ultimate right to compel the performance of the agreement to arbitrate and enforce the arbitration award is retained. But labor arbitration usually has no more need for subpoenas and interrogatories than commercial arbitration has for a four-step grievance procedure. The private and governmental facilities, to which most collective bargaining contracts refer, in their arbitration clauses, are of far more "practical" assistance in effectuating a safeguarded arbitration than a detailed legislative scheme. If a court under Section 301 can compel arbitration of a grievance under an agreement to arbitrate in a collective bargaining contract, in all likelihood the requirements for further formal proceedings in the arbitration proceeding itself cease to be of importance, particularly since a party may reserve his objections to the arbitrability of the grievance on the jurisdiction of the arbitration tribunal or other defenses appropriate to an action for enforcement of an arbitration award for ultimate decision

by the Court, if he objects to the award. See *United Electrical Radio and Machine Workers of America, Local 259 v. Worthington Corporation*, 236 F.2d 364 (1956)

These considerations make it plain, we submit, that the so-called "practical grounds" on which the Court below based its reluctance to employ Section 301 to enforce the agreement to arbitrate herein are not justified by the actual practice in labor management relations relating to arbitration under collective bargaining contracts.

D. *The District Court, with Jurisdiction Under Section 301, is Authorized to Grant Specific Performance on the Basis of Either Federal or Massachusetts Law.*

Whether the federal courts are granted jurisdiction, not based on diversity of citizenship, over a "contract governed entirely by state law" (*Association of Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 449) raises constitutional problems which are not present here. We are not dealing here with an individual contract of employment, or a State-created right which an employee and the Union could equally enforce, but with an arbitration clause in a collective bargaining contract made with a Union certified by the National Labor Relations Board as the exclusive representative of the production and maintenance employees of petitioner in an industry affecting commerce. This contract is governed in important respects by the Labor Management Relations Act of 1947. (See *International Brotherhood of Teamsters* v. *W. L. Mead Inc.*, 230 F.2d 536 (C.A. 1, 1956). The arbitration clause is linked with the no-strike clause (R. 33, 34) and the no-strike clause with the bargaining unit and recognition clauses (R. 10) all of which involve questions of interpretation under federal law. See *International Brotherhood* v. *W. L. Mead, Inc.*, supra. *Labor Board* v. *Lion Oil Co.*, 352 U.S. — January 27,

1957. The interpretation of these clauses or the contract as a whole or its breach may also be governed by state law, with respect to such matters as the parol evidence rule, rescission, and the like. If this were a suit by the Employer for damages for violation of the no-strike clause, it might become necessary to apply federal law with respect to some aspects of the contract and state law, with respect to others, for example, the duty to mitigate damages (*International Brotherhood* v. *W. L. Mead, Inc.*, supra.) In this case, where the suit is for the specific performance of the agreement to arbitrate, the application of either state or federal law creates no conflict. As we point out more fully below, this contract is valid and creates rights under Massachusetts law. *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137 (D.C. Mass.) and the Massachusetts courts, on the basis of recent decisions and legislative developments, have gone so far in expressing deference to federal policy favoring arbitration and in liberally construing the Massachusetts statute concerning the validity of arbitration agreements in collective bargaining contracts G. L. (Ter. Ed.) c. 150, Sec. 11 that there can be no doubt as to their hospitality to the remedy of specific performance as an appropriate remedy under Massachusetts law. (See IV *infra*) *Magliozzi* v. *Handschumacher*, 327 Mass. 569, *Sanford* v. *Boston Edison*, 316 Mass. 631, *Post Publishing Co.* v. *Cort*, 1956 Mass. A.S. 641, *Leonard* v. *Eastern Mass. Street Railways Inc.*, 1957 Mass. A.S. — January 21, 1957, Massachusetts law, however, does not permit an unincorporated association to sue in its own name *Tyler* v. *Boot & Shoe Workers Union*, 285 Mass. 54 (1933); *Donahue* v. *Kenney*, 327 Mass. 409 (1951). The present suit was commenced as a suit for violation of the arbitration clause seeking both damages and specific performance. It could not have been brought in the Massachusetts courts, with respect to the damage count, unless all the members of the

union were joined as parties plaintiff. *Sanford v. Boston Edison Co.*, supra.

These aspects of the law—state or federal—which may be applicable to a suit on the arbitration clause herein, demonstrate the necessity of furnishing a federal forum, as Section 301 does, for the protection of the federal labor policy, because of procedural difficulties in a state court, even where, as in Massachusetts, the same remedy may be granted under state law, as would be granted by the federal court. And, even if specific performance were not available under Massachusetts law, to enforce the substantive rights which are valid under Massachusetts law, "a federal court may afford an equitable remedy for a substantive right recognized by a state even though a State court cannot give it" *Guarantee Trust Co. v. York*, 326 U.S. 99. The exercise by the Congress of its "protective jurisdiction" is an appropriate grant of jurisdiction to the District Court to apply whatever law is available to protect the federal policy. See *International Brotherhood v. W. L. Mead, Inc.*, supra.

III. The Court Below Was Correct in Holding that the District Court Had Jurisdiction Under Section 301 and Authority Under the United States Arbitration Act to Enforce the Agreement to Arbitrate Herein.

The Court below held that the arbitration clause in the collective bargaining agreement herein is within the terms of Sec. 2 of the Act as "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract." (R. 76) It also held that the exclusion in Sec. 1 of the Act ("but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class

of workers engaged in foreign or interstate commerce") does not embrace collective bargaining agreements, as distinguished from individual "contracts of employment" and that the Arbitration Act applies to collective bargaining agreements within the limitations of other sections of the Act. (R. 79) It finally held that the test of Sec. 4 of the Arbitration Act, authorizing specific enforcement of an agreement to arbitrate by a district court "which, save for such agreement, would have jurisdiction of the subject matter of a suit arising out of the controversy between the parties", is satisfied by the complaint in this case, which meets the terms of Sec. 301 itself, because the union here is asking for relief which the individual employee could not equally enforce in a suit on his personal cause of action. (R. 81)

A. *The Exclusion in Sec. 1 of the Arbitration Act of "Contracts of Employment" Does Not Apply to Collective Bargaining Contracts.*

Petitioner's first objection is that the exclusion of "contracts of employment" in Sec. 1 of the Arbitration Act applies to collective bargaining agreements. It supports this objection by an elaborate survey of the legislative history of the Act and its historical setting. Petitioner has misread history on both counts.

The legislation, as drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar Association, was introduced in December 1922 as S. 4214 in the Senate and as H. R. 13522 (the "Mills Bill") in the House. 64 Cong. Rec. 732, 797 (1922) As it then stood, Sec. 1 of the bill defined "Maritime transactions" as including "seamen's wages, collisions, or any other matters in foreign or interstate commerce which, if the subject of controversy, would be embraced within ad-

miralty jurisdiction" and contained no exclusionary language. Sec. 2 provided that a written provision in any contract or maritime transaction or transaction involving commerce to settle a controversy by arbitration shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. At the 26th Annual convention of the International Seamen's Union of America, on January 13, 1923, the Union adopted an Analysis of the Mills Bill, submitted by its President, Andrew Furuseth, and, after discussion, a Resolution condemning the bill *Proceedings of the 26th Annual Convention of the International Seamen's Union of America 83-89*, 203 (1923).

The analysis,[10] resolution[11] and discussion[12] make it en-

[10] The Analysis states in part: "Let a clause to arbitrate be placed in any contract and any dispute about the meaning and enforcement of the contract must be referred to arbitration and the Court with all the Saxon rule of procedure and constitutional guarantees ceases to operate . . . The seamen having made contract to serve must serve. The railroad man having entered into a contract to serve with an arbitration clause therein must continue to serve; because such contract becomes through this law if enacted "Valid, enforcible, irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract . . . Thus it seems certain that this bill provides for the re-introduction of forced or involuntary labor if the freeman through his necessities shall be induced to sign . . . The personal hunger of the seaman and the hunger of the wife and children of the railroadman will surely tempt them to sign and so with sundry other workers in "Interstate and Foreign Commerce" . . . With reference to the seamen, it will be an easy matter. Place in the contract to labor—the shipping articles—any rider not specifically prohibited by law, and the articles are loaded down with such already, and then at the end of the articles, a rider already rather usual, that any disagreement shall be arbitrated by the Shipping Commission (under existing statutes this includes consuls) and the seamen's right to wages, to food, to damages under the Jones Act together with his present right to quit work in harbor becomes void. With the seaman, the machinery is there and ready. The shipowner only needs this bill to become law and slavery is restored without any other noise, except such as the victim may make . . . " (*id* at 203-204)

[11] The Resolution, under the heading of "Compulsory Labor" stated in part: "Resolved: That any form of compulsory labor is destructive

tirely clear that the Union objected to the bill because it feared that seamen, railroad men and sundry other workers in interstate commerce would be induced or required to sign individual contracts of employment, with arbitration clauses, and that then the right of the individual workers to wages, to food, to damages under the Jones Act, and to quit work in harbor, would become void; and that if Unions signed an agreement containing an arbitration clause, it would merely be an added danger, since the result would be to bind the members.[13]

On January 31, 1923, Herbert Hoover, then Secretary

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of fundamental American principles, in the fact that it denies the equal right of all men and that it recognizes and establishes bondage of one citizen to another . . . To use the necessities of men as in H. R. 13522 whether such necessities be individual or arising out of family relations, is especially reprehensible, because it makes need, hunger and want the basis of contracts which the American sovereign may legally be able to make and which a misused equity power will enforce, but which is an abdication of such sovereignty for the purpose of obtaining bread for self or family and further be it

"Resolved, That we condemn any policy, be it of a State or National scope, the purpose of which is to create bondage in any form for any purpose, except as a punishment for crime." (*id* at pp. 83-84)

[12] In urging the adoption of the recommendation of the Committee, President Furuseth said in part: "Now you are to think over this thing, particularly with reference to the riders in the articles and with reference to the rider that the Shipping Commissioners shall be the final arbiters . . . ". (*Id* at p. 89)

[13] "So far we have dealt with the individual. What about those who seek to protect themselves through mutual aid? Some organizations are very strong in their cohesiveness. Cannot those individuals save not only the individuals, but themselves? The Supreme Court has decided that voluntary organizations may be sued. If they shall enter into an agreement containing an arbitration clause, there can be little doubt that the organization will be bound. But would such action bind the members? The hatters case and the Coronado case seem to answer this question; but aside from these cases, does not the principle of the corporation law (excluding limitation of liability) apply? Would it not be held that the members are the stockholders, the convention the meeting of the stockholders, and that the Executive Board is the Board of Directors. And if such should be the decision of the Court (and we have seen something more remarkable than this would be), then organization would be an added danger." (*id.* at 204).

of Commerce, addressed a letter to Senator Sterling, Chairman of a subcommittee of the Committee on the Judiciary to which S. 4214 had been referred, urging the enactment of the bill, and adding

"If objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in interstate or foreign commerce' ". *Hearing before a Subcommittee of the Committee on the Judiciary, United States Senate* 67th Congress, Fourth Session on S. 4213 and S. 4214, January 31, 1923, p. 14.

It will be noted that the exclusionary language suggested precisely parallels the objection made by President Furuseth that the bill would apply to the individual contracts of employment of the "seaman . . . the railroadman, and sundry other workers in Interstate and Foreign Commerce" *Proceedings of the 26th Annual Convention of the International Seaman's Union* (1923) pp. 203-204.

On the same day, January 31, 1923, a hearing was held before the sub-committee of the Senate Committee on the Judiciary, at which a Mr. Piatt, chairman of the Committee on Commerce, Trade and Commercial Law of the American Bar Association, testified in support of the bill. In the course of his testimony, he stated to Senator Sterling:

> ". . . but there is another matter I should call to your attention. Since you introduced this bill there has been an objection raised against it that I think should be met here, to wit, the official head or whatever he is of that part of the labor union that has to do with the ocean—the seamen—
>
> Senator Sterling: Mr. Furuseth?
>
> Mr. Piatt: Yes, some such name as that. He has

objected to it and criticized it on the ground that the bill in its present form would affect, in fact, compel arbitration of the matters of agreement between the stevedores and their employers. Now it was not the intention of the bill to have any such effect as that. It was not the intention of this bill to make an industrial arbitration in any sense, and so I suggest that insofar as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language 'but nothing herein contained shall apply to seamen or any class of workers engaged in interstate and foreign commerce'. It is not intended that this shall be an act referring to labor disputes at all." (Hearings on S. 4213 and S. 4214, *supra*, p. 9)

Petitioner makes much of Mr. Piatt's statements that the bill was not intended to make an industrial arbitration or to refer to labor disputes at all (Br. 16-17) and to the casual remark of Senator Sterling, in discussing architects' and railroad construction contracts containing arbitration clauses, which the successful bidder would be required to take, as is, whether he wished the arbitration clause or not:

> "Let me suggest the question as to whether you have already covered that in a way and by your suggested amendment in regard to the labor associations; that they shall not be considered." (*id* at p. 10)

These statements do not alter the clear intent of the suggested amendment which was to eliminate the application of the Act to individual contracts of employment of seamen and others, on the basis of Furuseth's analysis. Labor disputes and industrial arbitration do not necessarily mean disputes between unions and employers; they are

wholly consistent, in the context, with the disputes, referred to by the Seaman's Union, over the content of individual contracts of employment (cf. Norris-LaGuardia Act 29 U.S.C. Sec. 113) and so is Senator Sterling's remark about the amendment suggested to take care of the objection raised by a labor association.

In any event, the Report of the Committee on Commerce, Trade and Commercial Law of the American Bar Association, following this hearing, made it quite clear that the proposed amendment was designed to overcome the objection based on the inclusion of agreements to arbitrate in individual contracts of employment. It stated

> "Objections to the Bill were urged by Mr. Andrew Furuseth as representing the Seaman's Union, Mr. Furuseth taking the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1 as follows: "(the present exclusionary language of Sec. 1 of the Act) 48 A.B.A. Repts. pp. 286-287 (1923) [14]

The bill was reintroduced in the next session of Congress

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[14] The Executive Council of the American Federation of Labor, in a sentence from its report which Petitioner omits (Br. p. 19) stated "The bill as originally presented appeared dangerous to seamen and other wage workers employed in the maritime service. Protests from the American Federation of Labor brought about an amendment . . ." (Proceedings of the 45th Annual Convention of the American Federation of Labor 52 (1925)).

To the same effect, see "The Commercial Arbitration Law" 9 A.B.A. Journal 523, 525, August, 1923. "The bill providing for arbitration in the federal courts was amended at the instance of the Representatives of the Seamen's Union who did not wish seamen's wages to be subject to compulsory arbitration. There was added to the bill to take care of this condition" (the present exclusionary language of Sec. 1).

(68th Cong. 1st Sess.) as S. 1005 and H.R. 646. The definitions in Sec. 1 now omitted reference to "seamen's wages" which had been included in the prior bill and added the present exclusionary language. It will be observed that the elimination of "seaman's wages" alone from Section 1 would not have overcome the objections of the Union to the bill since the bill also defined "maritime transactions" as including "any other matter in foreign commerce which is the subject of controversy would be embraced within admiralty jurisdiction". To meet the objection that the bill would deprive individual seamen of their right to quit work in harbor, to food, to the protection of the Jones Act and other matters within admiralty jurisdiction—matters which were the subject of the Union resolution, discussion and analysis—it was necessary also to amend the bill to except from its coverage the contracts of individual hire, so that those personal rights of individual employees would be protected against the threat of compulsory arbitration. The bill was enacted with amendments not pertinent here, without opposition, and with no further reference to the exclusionary language or seamen's wages. *Joint Hearings Before the Subcommittees of the Committees on the Judiciary,* 68th Cong. 1st sess. on S. 1005 and H. R. 646; House Rept. No. 96, 68th Cong. 1st sess.; Sen. Rept. No. 536, 68th Cong. 1st sess.

In the light of this legislative history, there is no warrant for petitioner's argument that contracts of employment of seamen, railroad workers and other classes of employees in interstate or foreign commerce means collective bargaining agreements of labor organizations. The evil to which the Seamen's Union objected was primarily the danger to seamen, railroadmen, and sundry other workers in interstate or foreign commerce if arbitration clauses were included in the written shipping articles or other individual contracts of employment. Secretary Hoover referred to the

objection based on "workers' contracts" as the basis for the amendment overcoming opposition to the bill. Mr. Piatt mentioned agreements between "stevedores and their employers". The Report of the Committee on Commerce, Trade and Commercial Legislation of the American Bar Association and the Bar Association Journal stated that the amendment was to overcome the objection based on compulsory arbitration of seamen's wages, and the Executive Council of the American Federation made its objection on the basis of danger to seamen and other wage workers. None of these—neither those who drafted and sponsored the bill nor those who objected to it—ever referred to collective bargaining agreements as affected or imperilled by the legislation, and the only reference to arbitration clauses in collective bargaining agreements came about when Furuseth argued that if such agreements were to include arbitration clauses, it would be an added danger, since it would bind the individual members.

Petitioner asserts that three of the International Seamen's Union's largest districts had collective agreements containing arbitration clauses and argues that the Union's opposition to the Act rested upon its possible effect on those arbitration clauses. (Br. pp. 13-14)

The agreements which petitioner cites are neither collective bargaining contracts, nor do they contain arbitration clauses. They are Agreements effective May 1920 to May 1921 between the United States Shipping Board; the Unions and the American Steamship Owners Association, for Wage Scales and Working Conditions, which were the outgrowth of the Atlantic War Agreement. These matters were subject to the approval of the United States Shipping Board, which fixed all rates of pay and determined working conditions. See *International Seamen's Union of America, a Study of its History and Problems. U. S. Dept. of Labor, Bureau of Labor Statistics* (June 1923) p. 57-59. *Proceedings of the 24th Annual Convention*

of the International Seamen's Union App. C, D and E, pp. 186, 190, 191. These agreements contained a clause for "a grievance committee to interpret the agreements and to prevent small but troublesome misunderstandings" (*International Seamen's Union of America, a Study of its History and Problems*, p. 58.) The Committee was composed of three representatives of the Union, and three representatives of the Steamship Owners Association, (See *Proceedings of the 24th Annual Convention of the International Seamen's Union*, pp. 176-187, 190, 193), with the Vice President and General Manager of the Association, (*id* p. 136, *Proceedings of the 25th Annual Convention*, p. 274) as Chairman. Arbitration is not mentioned nor was any procedure for arbitration provided in these clauses.

After 1921-1922, these agreements were not renewed, and collective bargaining for all practical purposes disappeared. *Written Trade Agreements in Collective Bargaining*, Ch. IX; *The Maritime Industry*, pp. 136-137, *National Labor Relations Board Division of Economic Research Bulletin No. 4*, November, 1939. There is thus no basis for petitioner's assertion that the Union's objections were motivated by any apprehension of being compelled to arbitrate, under the arbitration clauses in their collective bargaining contracts. They had no such agreements containing such clauses and, so far as Furuseth's analysis of arbitration clauses in such contracts indicates, the Union was opposed to including arbitration clauses in their contracts.

Petitioner also argues that to limit the exclusionary clause to individual contracts of employment strips it of practical significance, since only written provisions to arbitrate are within the Act and such written provisions were in 1925 and are now found not in individual contracts of employment, but in collective bargaining agreements. (Br. p. 24) This argument, for which no authority whatsoever is given, overlooks the fact that seamen are required to

sign individual contracts of employment in the form of shipping articles [15] and at and before the time of the Arbitration Act, were required to carry continuous discharge or grade books. See 46 U.S.C. 563, 564, 643(g) (j), 651. See *Robertson* v. *Baldwin*, 165 U.S. 287; *International Seamen's Union of America*, op. cit. pp. 31, 35; Norris, The Law of Seamen, p. 113.

At the time of the enactment of the Arbitration Act, the distinction between individual contracts of employment and collective bargaining agreements was well known. Written anti-union or "yellow dog" individual contracts of employment were prevalent in a number of industries and the question of their enforcement was an issue of public debate. In the same way, the trade agreements or union management collective bargaining contracts were well known. See *Cox, Cases on Labor Law* (1948) *Historical Introduction*, pp. 95-96; *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U.S. 229 (1917) dissenting opinion Brandeis, J.; *Int'l. Organization U. M. W. A.* v. *Red Jacket Cousal Coal and Coke Co.*, 18 F.2d 839 (C.A. 4) 1927.

The historical setting indicates that had Congress intended to exclude collective bargaining agreements, it would not have employed the words "contract of employment". The legislative history amply demonstrates that the exclusionary language was aimed at the exclusion of contracts for personal service.

B. *The exclusion in Sec. 1 of the Arbitration Act does not apply to the contract of the production and maintenance employees herein.*

In any event, the employees here involved are production and maintenance employees engaged in manufacturing in an

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[15] A typical clause in the Shipping Articles of the 1920s required that all questions between individual seamen and the Master of the vessel be heard and decided by the shipping commissioner or consul who was empowered to make a binding award. See *Proceedings 24th Annual Convention International Seamen's Union*, pp. 25-26.

industry affecting commerce (R. 10) and not "seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce". If "contract of employment" is to be read as including collective bargaining contracts, because of the historical setting in 1925 in which the term was used (Br. p. 12), then the coverage of the act and the employees as to whom it was to be made applicable should be read in the same setting. So read, it does not cover the contract of the production and maintenance workers in this case, since they are not engaged in interstate commerce.

If the decision of the Court below and of the Sixth Circuit[16] as to the meaning of "contract of employment" is rejected, then the decisions of the Second and Third Circuit,[17] which embody the foregoing rationale, should be followed. The legislative history strongly suggests that "the seaman, the railroadman and sundry other workers *in* interstate and foreign commerce" were the employees to be excluded from the Act, and that the coverage of the Act under the prevailing view of the commerce power was limited to such employees.

C. *Section 2 of the Arbitration Act Applies to Collective Bargain Contracts.*

Petitioner's objection to the holding of the Court below on this score is that the legislative history of the Act shows that it was intended to apply solely to commercial contracts and to have no application to collective bargaining contracts. (Br. pp. 25-26) It may well be, as the Court below

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[16] *Hoover Motor Express Co.* v. *Teamsters Local 327*, 217 F.2d 49 (C.A. 6, 1954); *Local 19, Warehouse Workers Union* v. *Buckeye Cotton Oil Co.*, 236 F.2d 776 (C.A. 6, 1956).

[17] *Signal Stat. Corp.* v. *United Electrical Radio and Machine Workers*, 235 F.2d 298 (C.A. 2, 1956); *Tenney Engineering Inc.* v. *United Electrical Radio and Machine Workers*, 207 F.2d 450 (C.A. 3, 1953).

agreed, that the attention of Congress was focussed on the field of commercial arbitration in 1925, because the proposed legislation was being pressed by advocates of commercial arbitration, but it by no means follows that only certain kinds of contracts evidencing transactions involving interstate commerce were brought within the scope of the Act. No apt language was used in Sec. 2 to circumscribe its scope. On the contrary, Sec. 2 was regarded as adopting a rule of law which would make all such contracts valid, irrevocable and enforceable, to overcome the "anachronism" of the common law in holding such contracts unenforceable. (See H. Rept. No. 96, 68th Cong. 1st Session) and H. R. Rept. No. 96, 68th Cong. 1st Session states that one foundation of the new regulatory measure is "the Federal control over interstate commerce and over admiralty" (p. 1) *Bernhardt* v. *Polygraphic Co.*, 350 U.S. at 201-202. A construction which accords a broader effect to the words "transaction involving commerce" than to the words "workers engaged in . . . commerce" not only avoids "a grudging type of construction carried down from the days of judicial hostility to all arbitration agreements". It also carries out what appears to be the intent of Congress to make Sec. 2 apply to all contracts within its power to regulate under the commerce power. Such an interpretation as applied to collective bargaining contracts would effectuate the federal labor policy to encourage arbitration, as expressed in the Norris La Guardia Act, the Labor Management Relations Act of 1947 and other federal labor laws. See *United Office Workers* v. *Monumental Life Ins. Co.*, 88 F. Supp. 602, 607 (D.C. ED, Pa. 1950).

D. *The District Court Had Jurisdiction Under Section 301 of the Labor Management Relations Act and Section 4 of the Arbitration Act to Compel Specific Performance of the Agreement to Arbitrate Herein.*

Petitioner seeks to overturn the holding of the Court below to this effect on the ground that Section 4 of the Arbitration Act requires that the District Court's jurisdiction must be founded on Title 28, and the complaint herein (excluding the claim of diversity jurisdiction) is founded on Title 29 U. S. C. Sec. 185. (Br. pp. 32-33) As to the formal aspect of this argument, it is sufficient to point out that in codifying this section of the law, the House Judiciary Committee specifically disclaimed any intention to change existing law, H.R. Rep. No. 255 80th Cong. 1st sess. (1947), and prior law conferred jurisdiction "under the judicial code at law, in equity or in admiralty". See *Murphy, The Enforcement of Grievance Arbitration Provisions,* 23 Tenn. L. Rev. 959-971 (1955); *Sturges and Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act* 17 *Law and Contemporary Problems,* 580 ftn. 1, 615-616 ftn. 80.(1952); *Cox, Grievance Arbitration in the Federal Courts,* 67 Harv. L. Rev. 595 ftn. 12 (1954).

Petitioner argues that jurisdiction under Title 28 cannot be supported on the theory that the case "arises under the Constitution, laws or treaties of the United States" within the meaning of Section 1331 of Title 28, because Sec. 4 of the Arbitration Act requires jurisdiction to be tested as if no arbitration agreement had existed and the underlying controversy which the Union seeks to arbitrate relates only to rights created by and arising out of the contract, not out of federal law. (Br. 32-35)

The Court below met this argument by holding that the effect of the *Westinghouse* decision was to eliminate from

Sec. 301 jurisdiction a complaint by a union that involves no more than a cause of action which the individual employee has equal power to enforce, but to leave within Sec. 301 jurisdiction a cause of action or remedy that appropriately pertains to the union as entity, particularly one which an individual employee may have no equal power to enforce (R. 80). It held, therefore, that the test of Sec. 4 will be satisfied by a complaint which, as in the case at bar, meets the terms of Sec. 301 itself. Since jurisdiction is conferred on the District Court by Sec. 301 and not by the agreement to arbitrate, the holding of the Court below is amply justified.

This is not a case where the District Court is given jurisdiction by the terms of the agreement to arbitrate itself, or where an executory agreement to arbitrate is made a rule of court. In such circumstances, absent any other jurisdictional basis, the District Court would not have jurisdiction under Section 4. Nor is this a case where the mere agreement to arbitrate is asserted as a ground of jurisdiction under Section 4. If a suit for violation of a collective bargaining contract, containing an agreement to arbitrate, were between an employer and a labor organization, but not in an industry affecting commerce, the District Court, absent diversity or other jurisdictional grounds, (but see *Bernhardt* v. *Polygraphic Co.*, supra) would not have jurisdiction under Section 4. And if the agreement to arbitrate did not relate or was not limited to controversies "arising out of" such collective bargaining contract in an industry affecting commerce, it may be that, absent other jurisdictional grounds, the District Court would have no jurisdiction (See R. 76). The jurisdiction of the District Court here arises not because of the agreement to arbitrate, but because Congress has in Section 301 granted the District Court jurisdiction over suits for violations of contract between parties in an industry affecting commerce, including

contracts which embody agreements to arbitrate; Section 2 of the Arbitration Act is a federal law which make such agreements valid, irrevocable and enforceable; and Title 28 U. S. C. Sections 1331 and 1337 confer federal question jurisdiction over the subject matter of the suit arising out of the controversy between the parties. Under the authority of these statutes, and not the agreement to arbitrate, the District Court has jurisdiction, under Section 4 of the Arbitration Act, to grant the remedy of specific performance.

Moreover, the Boiardi grievance involves the question of whether the company violated its promise, which runs only to the Union, to turn over to the Union a complete list of job classifications and rate ranges. (R. 44) This is a matter in which the Union's interest is sufficient to justify a cause of action under Sec. 301 (See *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F.2d 401 (C.A. 3, 1956)). While the underlying controversy in the Armstrong grievance involved a discharge, and so might be deemed an individual cause of action under the "eclectic theory" 348 U.S. at 457-8, it involves the interpretation of the contract term "discharge for cause", in which the Union has an interest, *qua* union, for the protection of all employees and not merely Armstrong.[18] (R. 45-46). In either case, individual

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[18] "It is common to include (in management right clauses) the right to suspend and discharge for "just cause", "proper cause", "obvious cause" or quite commonly for "cause". There is no significant difference between these phrases. They include the traditional causes of discharge in the particular trade or industry, the practices which develop in the day to day relations of management and labor and most recently they include the decisions of courts and arbitrators. They represent a growing body of common law that may be regarded as the latest development of the law of "master and servant" or perhaps more properly as a part of a new body of common law of "management and labor under collective bargaining contracts . . . It is immaterial how the Company's action is characterized, since, in any case, the dispute is as to the interpretation of the phrase 'discharge for proper cause'. An issue as to the meaning of a term in a contract is clearly

employees could not enforce the right, in most jurisdictions, unless the remedy of arbitration had first been exhausted by the Union. See *Cox: Rights Under a Labor Agreement* 69 Harv. L. Rev. 601, 647-652 (1956); *Snay* v. *Lovely*, 276 Mass. 159.

E. *Section 2 of the Arbitration Act Authorizes the Specific Enforcement of the Agreement to Arbitrate Herein.*

In a suit under Section 301 for violation of the agreement to arbitrate, which only the Union can enforce, Section 2 of the Arbitration Act is itself sufficient authority for the remedy of specific enforcement, if, as we submit, it applies to collective bargaining contracts, and such contracts are not excluded by the excepting clause of Section 1. Such authority can be invoked if for any reason Section 4 of the Arbitration Act is deemed inapplicable. The objection that Section 301 is procedural only and confers no substantive rights, would obviously be met, if Section 301 had expressly included the language comparable to that of Section 2 of the Arbitration Act, that agreements to arbitrate in collective bargaining contracts in an industry affecting commerce shall be valid, irrevocable and enforceable. No greater difficulty exists because the authority appears in a separate enactment. Whether viewed as a mere form procedure within the power of a federal court or a substantive right granted by a federal statute, see *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 202, the federal district court having power, under Section 301, is authorized to use a federal remedy to effectuate a federal policy. Such a remedy is authorized by Section 2 in general terms, although the scheme of the Act contemplated that the de-

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arbitrable." *In the Matter of Worthington Corp.*, 24 L.A. 1. See *Local 259, United Electrical Radio and Machine Workers of America* v. *Worthington Corp.*, 236 F.2d 364 (C.A. 1, 1956).

tailed procedures would be afforded by Section 4. But Section 4 is not in terms an exclusive procedure, and no reason in the language of that Act or in federal policy requires its interpretation as exclusive. Where jurisdiction is separately conferred by Section 301, Section 4 is merely an alternative procedure for granting the remedies authorized by Section 2 and Section 2 is properly invoked, when Section 4 is inapplicable.

IV. The District Court Has Jurisdiction Under Title 28 U. S. C., Sec. 1332 (a) (1) to Decree Specific Performance of the Agreement to Arbitrate Herein.

The amended complaint alleges that the plaintiff union maintains its principal office in Ashland, Massachusetts, where its officers and agents are engaged in representing and acting for employee members; that defendant is a corporation organized under and by virtue of the laws of the State of New York; that the matter in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs; that plaintiff has no adequate remedy at law; that plaintiff will be subject to irreparable damage unless granted the relief requested; and that the action arises under the provisions of Section 301 (a), 301 (b) and 301 (c) of the Labor Management Relations Act of 1947. (R. 42, 45, 55-56)

In the Court of Appeals, plaintiff moved, under Title 28 U. S. C. Section 1653 to amend its complaint to allege diversity of citizenship between all the members of the Union and defendant and jurisdiction under Title 28 U. S. C. 1332 (a) (2) and supported this by an affidavit of the Business Agent of the Union, which was not controverted (R. 57-58). The Court below denied the motion on the ground that "it may have become moot but it must in any event be denied, for it cannot accomplish the result intended" citing Rule 17(b) F. R. C. P. and cases which hold

that under Massachusetts law a Union does not have capacity to sue as an entity. (R. 82)

Since our argument, on the basis of diversity jurisdiction, supports rather than seeks to overturn the judgment of the Court below, even though it was rejected by that Court, and since both parties have briefed the question in the Court below (R. 69) and in this Court in the *certiorari* proceedings (Brief for Respondent in Opposition pp. 13-14; Reply Memorandum for Petitioner p. 4) and petitioner has argued the matter in its main brief (Br. pp. 34-35), we are entitled to urge that argument now, *Langnes* v. *Green*, 282 U.S. 531, 535-539; *Walling* v. *General Industries Co.*, 330 U.S. 545, 547.

The Court below erred in denying the proposed amendment.

A. *The Union Had Capacity to Sue as an Entity Under Rule 17(b) of the Federal Rules of Civil Procedure and Without Regard to its Capacity Under Massachusetts Law.*

The legislative history of Section 301(b) indicates that it was intended not merely as applicable to suits under Section 301(a) but as a general competency statute. The Conference Committee Report states that

> "This subsection and the succeeding subsections of Section 301 of the conference agreement (as was the case in the House bill and also in the Senate amendment) are general in their application, as distinguished from subsection (a)" *H. Conf. Rept. No. 510 on H. R. 3020*, 80th Cong. 1st sess. p. 66.

The text of the statute carries out this intention. While Section 301(e) limits the applicability of that subsection 301, Section 301(b) to (d) are phrased in terms of general

application. Had Congress any intention of limiting Section 301(b) to Section 301 actions, it would have said so, as it did with respect to Section 301(e). Its failure to do so confirms the statement in the Conference Report, that Section 301(b) was intended to be of general application and thus a simple extension of Rule 17(b).

The decisions of those courts which have considered the matter support this view. Thus, in *Rock Drilling Local Union No. 17* v. *Mason & Hanger Co., Inc.*, 90 F. Supp. 539 (S.D. N.Y. 1950, aff'd 217 F.2d (C.A. 2, 1954) cert. den. 349 U.S. 915 (1955)), a tort action brought by a labor union, the District Court held that, while Section 301 (b) does not enlarge the jurisdiction of the federal courts, unlike Section 301(a) its application is not limited to suits for violation of collective bargain contracts:

> "It is a capacity provision applicable generally, which is a simple extension of Rule 17(b) F. R. C. P. under which the right of an unincorporated association to sue in its common name is limited to cases involving federal rights." (at 542)

The Court of Appeals in the same case agreed:

> "The capacity statute, applicable generally to all suits by or against labor unions, is contained in Section 301(b) (at 691-692) . . . (Congress gave) to such organizations generally the capacity to sue or be sued in the federal courts, as provided in Section 301(b). The portion of Section 301(b) relied on by plaintiff is a capacity statute pure and simple and goes no further. *Amazon Cotton Mills* v. *Textile Workers Union*, 167 F.2d 183, 187-188 (4th Cir. 1948)". See *Milk Drivers Union* v. *Gillespie Milk Products*, 203 F.2d 650 (C.A. 6).

In *United Electrical Radio and Machine Workers of America, Local 259* v. *Worthington Corp.*, 236 F.2d 364 (C.A. 1, 1956), the Court below on allegations with respect to the plaintiff union, and its members, identical with those in the case at bar held, without adverting to Section 301(b), that "On the record before us, taking into account the citizenship of the individual plaintiffs and of the members of the plaintiff union, it seems that there is diversity jurisdiction as to all parties and also federal jurisdiction under Section 301 of the Taft Hartley Act as to plaintiff union alone." (at 371)

Moreover, in the *Westinghouse* case, 348 U.S. 437, we are told that all that Section 301 does is to give procedural directions to the federal courts. "When an unincorporated association which happens to be a labor union appears before you as a litigant in a case involving a breach of a collective agreement, 'Congress in effect told the District Courts,' treat it as though it were a natural or corporate person and do so regardless of the amount in controversy and do not require diversity of citizenship." (Frankfurter, J. at 443) These directions are separable, and no greater difficulty arises in accepting the first part, than arises in accepting the whole. Thus, treating Section 301(b) as a simple capacity statute, it applies where, as here, a basis of jurisdiction is present, although not required by Section 301(a).

This view of Section 301(b) creates no constitutional problem under the *Westinghouse* decision, since it does not seek to expand federal jurisdiction, nor under *Erie Railway Co.* v. *Tompkins*, 304 U.S. 64 (1938), *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945) or *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 202 (1955), since the question of competency is merely a procedural matter that does not affect rights created under applicable state law. Here, the question is not of the very existence of the right, but of the capacity of the party to sue on the basis of an existing right.

The question of the suability of a trade union "is after all in essence and principle merely a procedural matter" *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 390 (1922).

In this view, the effect of Section 301(b) is to extend or amend Rule 17(b) by giving capacity to the union as an entity, in a suit where the court has diversity jurisdiction and state law is applied. "Where federal policy has been formulated to an extent sufficient to warrant inclusion in the federal rules, (to employ a federal rule) would clearly not be inconsistent with the *Erie* case itself, since underlying obligations created by the state would be enforced according to state law. No federal rule has ever been declared invalid by the Court because of inconsistency with the *Erie* doctrine. *Kaplan, Suits Against Unincorporated Associations under the Federal Rules of Civil Procedure*, 53 Mich. L. Rev. 945 (1955).

The same result is reached if Section 301 is held to create a federal substantive right, but this right is defined by incorporating state substantive law as a part of the federal substantive law (See Reed, J. concurring and Black and Douglass JJ. dissenting in *Association of Employees* v. *Westinghouse Electric Corp.*, 348 U.S. at 462-463, 465. On this basis, the rights are truly federal, not state, and an unincorporated association may thus sue in its common name to enforce that federal substantive right under Rule 17(b) F. R. C. P. and § 301 (b)). Or § 301 itself may serve as a substantive right giving the union capacity to sue under Rule 17(b). "For all that can be derived from legislative history, Section 301 may merely have been intended as a direction to district courts to treat unions as falling within the second clause of Rule 17(b). . . . Congress seems to have so loosely employed the term substantive right that it may have intended Section 301 to serve as the substantive right existing under the . . . laws

of the United States described in rule 17(b). 'Law' encompasses both substantive and procedural provisions and 'substantive right' may be considered merely as capacity to sue" (*Mendelsohn, Enforceability of Arbitration Agreements under Taft Hartley Section 301.* 66 Yale L. J. 191-192, footnotes omitted (1956)).

B. *The Union and All Its Members are Diverse in Citizenship from Petitioner.*

Under any of the foregoing views the union has capacity to sue as an entity. If its citizenship is established for diversity of purposes, like that of a corporation, by the venue and jurisdictional tests of Section 301, i.e. in the district where it maintains its principal office or where its duly authorized officers or agents are engaged in representing or acting for employee members (Section 301(c)), diversity jurisdiction is established without more. The union maintains its principal office and represents employees in Massachusetts; petitioner is a New York corporation. If the conventional test is applied,—the diversity of the citizenship of the individual members of the unincorporated association (see *Levering & Garrigues* v. *Morrin*, 61 F.2d 115, 117, 118 (C.A. 1932), aff'd 289 U.S. 103 (1933)),—the affidavit of the Business Agent of the union and the proposed amendment to the amended complaint (R. 57-58) meet that test. All the members of the union are citizens of Massachusetts, Rhode Island and New Hampshire, none are citizens of New York.

C. The Matter in Controversy Exceeds $3,000.00

The required jurisdictional amount is alleged in the motion to amend the amended complaint (R. 55-56), which was allowed (R. 56). The petitioner had earlier filed its answer to the amended complaint, which did not contain any allegation as to the jurisdictional amount (R. 42, 47) and no answer was filed to the amended complaint as amended because of the dismissal of the suit by the District Court, on petitioner's motion to strike request for specific performance (R. 47, 53, 55-56). Any challenge to this jurisdictional amount, now, before answer and before proof is had of the amount in controversy, would be premature *McNutt* v. *General Acceptance Corp.*, 298 U.S. 178, *Bell* v. *Preferred Life Assurance Society*, 320 U.S. 238. In any event, the value of the right which the Union seeks to protect, the object of the suit and the matter in controversy, is the right to compel specific performance of the agreement to arbitrate, and particularly in this case, during the life of its contract, i.e. from at least April 1954 to date. If the measure of the value of the right is the value of the contract with and without an enforceable arbitration clause, or the cost to the Union in calling a strike to settle grievances which petitioner refuses to arbitrate, or the cost to the Union in seeking to enforce the agreement herein or any other principle is applied which measures the loss to the Union in dues or otherwise from interference with its right to have these or any other grievances arbitrated, it is clear that the allegation on its face is stated in good faith, without manifest error in law, and that the matter in controversy may reasonably be found to exceed $3,000.00. In advance of trial and proof on the matter, it is thus not apparent to a legal certainty that the value of the right does not exceed $3,000.00.

D. *The Estimate is Fully Warranted that Under Massachusetts Law Agreements to Arbitrate in Collective Bargaining Contracts are Specifically Enforceable.*

If the *Erie*, *York* and *Bernhardt* decisions require state law to be applied in a case involving a suit for specific performance of an agreement to arbitrate in a collective bargaining contract in an industry affecting commerce, where diversity jurisdiction is asserted, the applicable state law, here Massachusetts law, authorizes that remedy.

1. Massachusetts law relating to specific performance of agreements to arbitrate in collective bargaining contracts.

In Massachusetts, the law governing agreements to arbitrate has developed from early decisions at common law that such agreements were invalid and unenforceable, through a series of enactments, to decisions that such agreements are valid, and, in certain circumstances may be specifically enforced. Moreover, in two recent cases, decided since the decision of the Court of Appeals in the case at bar, the Supreme Judicial Court has exhibited an unmistakable hospitality to the remedy of specific enforcement of such agreements in typical collective bargaining contracts, although on the facts in each case, the Court found it unnecessary to apply the remedy. Paralleling this course of judicial decision under existing statutes, recent legislative developments are underway which, if enacted, will remove all doubt as to the availability of the remedy in such cases, and wholly undermine the original judicial rule.

At common law, in Massachusetts such provisions for arbitration were not valid *Sanford* v. *Boston Edison Co.*, 316 Mass. 631, 636, 56 N.E. 2d 1, 4 (citing cases). See Rule 92, Superior Court Rules 1932 Annotated (1932). A lim-

ited statutory provision for the enforcement of agreements to submit to arbitration controversies thereafter arising under a contract was enacted in 1925 (G. L. C. 251, as amended by St. 1925 C. 294; G. L. (Ter. Ed.) C. 251, Secs. 14-22). In the *Sanford* case, *supra*, the Court held that a union's right to specific enforcement of a union check off agreement in a collective bargaining contract could not be defeated by a requirement that it submit the matter to arbitration, since the arbitration provisions in the contract were not valid at common law and were so comprehensive as not to fall within the limited provisions of the statutory grant. In 1949, however, a broad arbitration statute was enacted, providing for voluntary arbitration in labor disputes by the Board of Conciliation and Arbitration of the Department of Labor and Industries and for private arbitration. (Mass. G. L. (Ter. Ed.) C. 150, Secs. 1, 5, 6, 11). Section 11 provides "All provisions of collective bargaining agreements relating to arbitration and conciliation before public or private arbitration and conciliation tribunals shall be valid, and if the parties to such agreements agree that the determination of the tribunal on any issue shall be final, such determination shall be deemed final and shall be enforceable by proper judicial proceedings." In *Magliozzi* v. *Handschumacher*, 327 Mass. 569 (1951) the union brought a suit for specific performance of an arbitration award and for the reinstatement of an employee. The Court rejected the contention that "proper judicial proceedings" for an award of money can only mean actions at law. It held:

"This overlooks both the nature of the contract and the purpose of the statute. The contract purports to afford a prompt and peaceful settlement of labor disputes, in part by resort to arbitration. The present arbitration was brought about in an attempt to determine the seniority rights of the plaintiff Hyde, and resulted in what we hold

to be a valid arbitration award. If the equitable remedy should be ruled to be unavailable to the plaintiff, the alternative could be strife or delay attending a strike or the outcome of successive actions at law to recover the sum of not more than $52.00 weekly. Such a restricted interpretation of the legislative intent would not be reasonable. Moreover, the Legislature must have known that in an action at law all the members of the Local and International would be necessary parties." (*id* at p. 573)

At the time of the Court of Appeals decision in the case at bar, the *Sanford* and *Magliozzi* cases, which it cited, were the only labor cases decided under the 1925 and 1949 statutes, as they were in 1953 when the United States District Court for Massachusetts (Wyzanski, J.) construed the statute as validating a similar contract to arbitrate and as creating rights in the parties (*Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137, 1953). The Court of Appeals observed, however, that "In Massachusetts, it is not at all clear what is the present status of such enforcement" (R. 72-73).

Just three weeks after the decision of the Court of Appeals, the Supreme Judicial Court handed down its decision in *Post Publishing Co.* v. *Cort*, 1956 Mass. A. S. 647, 134 N.E. 2d 431. The employer there had sought a bill in equity against the representatives of the Union and the American Arbitration Association to enjoin arbitration of the claims of certain employees under a collective bargaining contract. The Court affirmed a decree of the lower court refusing to enjoin the arbitration. As against the contention that the claims were within the exclusive jurisdiction of the National Labor Relations Board, the Court said

> "And in the absence of a clear expression of Congressional intent, we shall not assume a lead in rendering largely useless a common method of expediting

settlement of a labor controversy and a method which is approved in a congressional declaration of policy. . . . We cannot believe that Congress intended to create a no-man's land where voluntary arbitration is barred and the National Labor Relations Board may be too over-burdened to enter. There must be a penumbral zone where an initial tribunal selected by the parties may be permitted to reduce controversies in both number and scope prior to resort to an administrative or judicial tribunal. . . . Here arbitration should at least be allowed to sweep away grounds of dispute which are not within any preempted field."

In its most recent decision (*Leonard* v. *Eastern Massachusetts Street Railway Co.*, 1957 Mass. A.S. — January 21, 1957) in a suit on an agreement to arbitrate in a collective bargaining contract, the Court issued a decree declaring the obligations under the contract, that the Union, upon compliance with certain procedural provisions of the contract, was entitled to have the grievances of two employees allegedly discharged for unjust cause heard by arbitrators, in accordance with the contract, if they were not otherwise disposed of prior to invocation of the arbitration procedure. Holding that "the case does not present any aspect calling for an order to arbitrate", the Court added "There is no reason to assume, now that it has been determined . . . that there are existing rights under the contract, that the defendant will not honor such rights fully, throughout the remaining stages of the grievance procedure, including arbitration, if that stage is reached."[19]

[19] In a footnote the Court referred to "the issue argued and not decided of the enforceability of agreements to arbitrate", and cited, *inter alia*, the decision of the Court of Appeals in the case at bar, *Textile Workers Union* v. *American Thread*, 113 F. Supp. 137 and *Textile Workers of America CIO* v. *Lincoln Mills of Alabama*, 231 F(2d) 81 (C.A. 5).

The legislative development which supplements this course of judicial decision is found in bills introduced in the 1956 and 1957 sessions of the General Court to establish a uniform arbitration act. (Senate No. 265, 1956, House No. 2985 (1956), Ch. 90 of the Resolves of 1956; House No. 1378 (1957). The proposed legislation is modelled on the draft uniform arbitration statute approved by the Conference of the Commissions on Uniform state Laws and by the American Bar Association (Arbitration News No. 6, 1955, Special Arbitration Law Issue, American Arbitration Association.)

From the foregoing review of Massachusetts law, it is clear beyond cavil that an agreement to arbitrate future disputes contained in a collective bargaining agreement is valid and creates rights in the parties; that the state court will not enjoin an arbitration proceeding under such an agreement which is being conducted over the objection of one of the parties; and that a declaratory decree will be issued that the moving party is entitled to have grievances heard by arbitrators in accordance with the contract provisions. These rulings are accompanied by expressions by the Court of approval of equitable relief, in the circumstances; of arbitration provisions in contracts; and of a liberal interpretation of the statute. Short of an advisory opinion that such agreements are specifically enforceable, beyond the decisions necessitated by the facts in the cases before it, it is difficult to see how the Massachusetts court could have exhibited greater hospitality to the remedy of specific enforcement of arbitration clauses in collective bargaining contracts. The legislative policy, already expressed in the 1949 statute validating such agreements, and in the process of further development in proposed uniform legislation, points in the same direction.

Under these circumstances, there is clearly no merit in petitioners' arguments that "the common law rule was not changed by Section 11 of G. L. (Ter. Ed.) c. 150, enacted in 1949" (Br. p. 51) or its other attempts to construe the statute with respect to the enforcement of agreements to arbitrate as if the common law still governed. (Br. pp. 50-51)

In ascertaining the meaning of state law, this Court in *Bernhardt* v. *Polygraphic*, 350 U.S. 198 adverted to the fact that in that case there was no later authority than a 1910 decision of the Supreme Court of Vermont that an agreement to submit to arbitration would not be binding, that no fracture of the rules had appeared in subsequent decisions or dicta, and that no legislative movement is underway to change the result of those cases. And Mr. Justice Frankfurter, in his separate opinion, noted that "Law does change with times and circumstances and not merely through legislative reforms. It is also to be noted that law is not restricted to what is found in Law Reports or otherwise written. . . . " (*id* at pp. 209-210) In view of the national policy approving arbitration as a method of settling labor disputes (See p. 36 *supra*) the widespread and growing use of arbitration clauses in collective bargaining contracts (See p. 37 *supra*) and the shift in judicial attitude toward the enforcement of such clauses in collective bargaining disputes in Massachusetts and elsewhere, (see Frankfurter, J. in *Bernhardt* v. *Polygraphic* at pp. 209-210 and cases cited at pp. 34-35 *supra*) it is, we think, a fully warranted estimate that under Massachusetts law, if this case were brought in the state court, the agreement to arbitrate here in issue would be specifically enforced.

Conclusion

Affirmance of the judgment of the Court below would go a long way toward making effective a useful device, in which all concerned—employers, unions, employees and the public—have an important interest. Legislation already on the books, whether the Arbitration Act, or the Labor Management Relations Act, or both, is an adequate basis for compelling specific performance of agreements to arbitrate, and the Norris La Guardia Act does not stand in the way. The constitutional problems which troubled some members of this Court in the *Westinghouse* case are not insurmountable and, indeed, are not even raised by petitioner in this case.

If federal law is to be applied, a desired uniformity will be achieved in the interpretation and enforcement of such agreements, many of which are "master agreements" covering labor relations matters between a single employer operating in many states and a single union representing the employees.

But even if state law is to be applied, under Section 301 or in diversity jurisdiction, such an application is more in accord with the national policy than a complete refusal to enforce the agreement. If this Court sanctions specific enforcement, it is probable that state courts will construe state law accordingly, as Massachusetts has done in recent decisions which express a deference to national policy, or that pending legislation, such as the uniform arbitration act, will be advanced as a method of furthering national policy, if a uniform federal law is not available. Contrariwise, if, despite the national policy, and a favorable Massachusetts source of law, this Court should decline to permit specific performance, there is a substantial likelihood that unions will refuse to include no-strike and arbitration clauses in collective bargaining contracts, on the unan-

swerable ground, that such clauses, being actionable, but not enforceable, represent a liability in damages and deprive them of the benefit in the arbitration clause which was the consideration for the no-strike clause.

Affirmance of the judgment of the Court below would remand this case presumably to the District Court, which would interpret Massachusetts law, if applicable; decide all questions relating to arbitrability; and hear the case on the merits. Thus, the only question before this Court is the essential and general question of whether, in the industrial society of the United States today, agreements to arbitrate in collective bargaining contracts in an industry affecting commerce are, under existing law, enforceable agreements in the federal courts. As to this question, we believe that there is only one answer.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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